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IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

OWEN H. BROOKS, *et al.*, *Appellants*,

v.

WILLIAM F. WINTER, Governor, *et al.*,
Appellees/Cross-Appellants.

On Appeal From The United States District Court For The Northern District Of Mississippi

JURISDICTIONAL STATEMENT ON CROSS APPEAL

WILLIAM ALLAIN
Attorney General, State of Mississippi

*JERRIS LEONARD
KATHLEEN HEENAN
JERRIS LEONARD & ASSOCIATES, P.C.
900 17th Street, N.W., Suite 1020
Washington, D.C. 20006
(202) 872-1095

CHAMP TERNEY
HUBBARD T. SAUNDERS, IV
NICKI MARTINSON
1164 Deposit Guaranty Plaza
Jackson, Mississippi 39201

R. SCOTT LEVANWAY
727 N. President Street
Jackson, Mississippi 39202

Attorneys for Appellees/Cross-Appellants
**Counsel of Record*

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QUESTIONS PRESENTED

I. Whether a State covered under Section 5 of the Voting Rights Act which has timely and in good faith endeavored to comply with the preclearance requirement, has a right to adjudicate fully and without prejudice the validity of its legislatively created redistricting plan before the local federal court can alter the Legislature's political program?

II. Whether an objection interposed by the Attorney General, which is not dispositive of the issue of Section 5 compliance because the State has filed a D.C. district court action for declaratory judgment, constitutes a statutory defect which a local federal court must address in fashioning interim relief to remedy an unconstitutional apportionment of Congressional Districts?

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IN THE

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OCTOBER TERM, 1982

No. 82-233

OWEN H. BROOKS, *et al.*, *Appellants*,

v.

WILLIAM F. WINTER, Governor, *et al.*,
Appellees/Cross-Appellants.

On Appeal From The United States District Court For The Northern District Of Mississippi

JURISDICTIONAL STATEMENT ON CROSS APPEAL

OPINION BELOW

The June 8, 1982 Memorandum Opinion and Order of the three-judge district court for the Northern District of Mississippi is officially reported at *Jordan* v. *Winter*, 541 F. Supp. 1135 (N.D. Miss. 1982). It is set forth in the accompanying Appendix A.

JURISDICTION

On April 5, 1982, the Plaintiffs filed their Complaint in the Northern District of Mississippi invoking federal jurisdiction pursuant to 42 U.S.C. § 1973j(f) and 28 U.S.C. §§ 1331 and 1343. A statutory three-judge court was convened in accordance with 28 U.S.C. § 2284(a). The Court entered a Memorandum Opinion and Order on

June 8, 1982. The Plaintiffs filed a Notice of Appeal on June 15, 1982. The cross-appellants received the Jurisdictional Statement docketing that appeal on August 12, 1982.

This cross-appeal is docketed pursuant to Rule 12.4 of the Rules of the Supreme Court of the United States. Jurisdiction is conferred on this Court by 28 U.S.C. § 1253 to review a decision of a statutory three-judge court upon appeal by any party from an order or judgment granting or denying injunctive relief.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourteenth Amendment and Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c are set forth in Appendix B.

STATEMENT OF THE CASE

During its regular 1980 session, in anticipation of the 1980 census and the need for legislation to bring the State's 5 Congressional districts into compliance with the constitutional requirements of population equality, the Mississippi Legislature established the standing Joint Congressional Redistricting Committeee, [the "Committee"], Miss. Code Ann. §§ 5-3-121, *et seq.* (Supp. 1981). The Committee Staff began its work immediately so that legislation would be enacted and precleared well in advance of the June 1982 primary. As soon as the Census Bureau released the 1980 population data to the State, the Committee Staff began to build an appropriate data base for use in drafting a plan to equalize the population disparity among districts reflected in the census data.

Mindful of its statutory obligation under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C.

§ 1973c to preclear all changes in voting standards, practices and procedures, the Committee retained special outside counsel to assure that the new legislation would meet Section 5 requirements. Throughout the first part of 1981, the Committee held eight public hearings in different locations across the state with at least one in each Congressional district. The hearings were announced in advance in print and electronic media, and were well attended. The Staff prepared computer analyses, including population deviation and racial composition information, for every plan advocated at the public hearings or proferred to the committee.

The meetings of the Committee were open to the public and the minutes were retained in the Commitee's files. All maps, computer print-outs, census data as well as Committee minutes and Public Hearing records were available for public inspection in the Committee Office in Jackson. The State made every effort to encourage public participation and to assure an open process.

After the Committee reviewed and discussed the issues and proposals, and with advice of counsel, the members recommended the adoption of a plan which differed from the existing plan only where necessary to achieve population equality. This basic 5-district configuration is the same as the existing plan, Miss. Code Ann. § 23-5-223 (1972), enacted in 1972, which in turn is identical to the 1966 plan. Maps of the 1966, 1972, and 1981 plans are included in Appendix C. The Committee adopted this "least changes" approach to accommodate several goals. First, the existing lines had been submitted to the Attorney General in 1972 under Section 5 and precleared. (No objection-letter attached at Appendix D.) In addition, the basic configuration withstood a constitutional challenge in 1967. In *Connor* v. *Johnson*,

279 F. Supp. 619 (S.D. Miss. 1966) (three-judge court) *aff'd.*, 386 U.S. 483 (1967), the district court found that the district lines did not have a discriminatory purpose or effect. 279 F. Supp. at 623-24.[1] The Committee relied on these prior determinations of federal statutory and constitutional compliance to guide its decision-making process. Furthermore, the "least changes" approach served to preserve the electoral base of the members of the State's powerful incumbent delegation.

The issue of whether to depart from the existing districts for the sole purpose of constructing a Delta district or other "safe" black majority seat was vigorously de-

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[1] The 1960 census results reduced Mississippi's number of Congressional representatives from 6 to 5. During its regular session in 1962 the Legislative enacted a reapportionment which merely collapsed the old Second and Third districts into one new district. The result was a grossly malapportioned plan with an overall deviation of nearly a full district size.

On October 19, 1965 the Mississippi Freedom Democratic Party and other plaintiffs instituted an action in the Federal District Court for Southern District of Mississippi for an apportionment on a strict population basis. *Connor* v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966). Before the case came on for a hearing, the legislature enacted House Bill No. 911, Laws of Mississippi 1966, which recast the 5 districts so as to achieve an acceptable population deviation. On July 12, 1966 the Plaintiffs amended their complaint to challenge H.B. 911 on the grounds that it had the purpose, intent and effect of denying blacks a fair opportunity to vote and elect representatives of their choice.

On September 30, 1966, an opinion issued in which the three-judge panel made specific findings that the Plaintiffs failed to prove either the intent or effect of discrimination. 276 F. Supp. at 623-24. The Plaintiffs appealed to the Supreme Court of the United States and the judgment of the district court was affirmed. *Connor* v. *Johnson*, 386 U.S. 483 (1967). *See* Ex. C-1, Binder 5, Attachments Q-X.

bated at the hearings, at the committee meetings and in the Legislature. The Legislature, however, decided that the preservation of the two existing impact districts with black populations of 40 percent or more, better accomplished their purpose of political effectiveness for blacks than did one clear majority district which would sacrifice power for visibility. Tr. 165-67.

In August 1981, in keeping with the Committee's least changes proposal, the Legislature enacted S.B. 2001. The racial composition and population deviations for the 5 districts are as follows:

District	Total Population	Deviation	% Deviation	Black %
1	504,107	-21	-.0042	29.79
2	504,024	-104	-.0206	47.95
3	504,237	+109	+.0216	33.38
4	504,123	-5	-.0010	45.32
5	504,147	+19	+.0038	19.54

The Committee staff and counsel immediately began to prepare the Bill for submission to the Department of Justice. On November 11, 1981, S.B. 2001 together with all the information and materials itemized in the Department of Justice Regulations implementing Section 5, 28 C.F.R. §§ 51.25, *et seq.*, was submitted. On January 11, 1982, despite the State's unquestionable compliance with the submission requirements, the Attorney General, expressing his uncertainty as to the standard or benchmark to be used to measure retrogression—the barometer of discriminatory effect—requested more information. (This letter is included as Appendix E.) The State furnished data on prior redistrictings and attempted to elucidate its position that S.B. 2001 could not be said to retrogress since it enhanced black voting strength as compared to the previously precleared 1972 plan. On March 30,

1982, the Assistant Attorney General interposed an objection to S.B. 2001 stating that the State had not carried its burden of showing that the configuration of district lines east-west across the Delta region had neither the purpose nor the effect of denying the right to vote on account of race. On April 7, 1982, the State of Mississippi filed an action for declaratory judgment under Section 5, in the United States District Court for the District of Columbia. *Mississippi* v. *Smith*, No. 82-0956 (D.D.C.)

While the State's Section 5 action was pending, the plaintiffs filed this action in the U.S. District Court for the Northern District of Mississippi seeking declaratory and injunctive relief and the imposition of one of two proposed interim plans, designed by State Senator Kirksey, each containing a 65% black majority district in the Mississippi Delta region. The State, through the defendant state officials, requested that the court order S.B. 2001 into effect as an interim plan pending preclearance by the District of Columbia Court.

The three-judge district court found that the plaintiffs' "Kirksey" plans were obvious racial gerrymanders. 541 F. Supp. at 1144. It declined, however, to order temporary use of S.B. 2001, and instead chose the so-called "Simpson" plan urged by the State A.F.L. - C.I.O. as amicus curiae, and which contains a 53.7% black district. The district court acknowledged that S.B. 2001 represented a good faith judgment by the Legislature faced with the choice between two impact districts and one substantial majority district. Thus, the court found that the Legislature's preference for impact districts was a legitimate state policy to be honored in ordering interim relief. Nonetheless, while the court noted that it was within its discretion to order the interim use of an unprecleared legislative plan, 541 F. Supp. at 1141, it felt constrained

to reject S.B. 2001, "since we have other plans which allow us to order temporary redistricting which adequately reconciles state political policy with federal statutory and constitutional standards." 541 F. Supp. at 1142.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Contrary to the rhetoric of the Appellants' Jurisdictional Statement, the significant issues in this case concern the procedural rights of a State covered by Section 5 of the Voting Rights Act. Despite every effort by the State of Mississippi to comply completely and expeditiously with the procedural and substantive requirements of Section 5, the order of the Court below has deprived the State of its right to adjudicate fully and without prejudice the statutory validity of S.B. 2001.

The interim plan imposed below eschews S.B. 2001 to achieve a 53.7% black 2nd district in place of the 47.9% black 2nd district in S.B. 2001. The State's right to pursue a declaratory judgment under Section 5 has been severely prejudiced because the District of Columbia Court has adopted the interim plan as a benchmark from which to measure any retrogressive effect of S.B. 2001. *Mississippi* v. *Smith*, No. 82-0956 (D.D.C. June 28, 1982) (Appendix F).[2]

The *Smith* court adopted this rule of law based on its reading of the district court's opinion in *Mississippi* v. *United States*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd.* 444

[2] The court determined that the interim plan would be the benchmark in its memorandum opinion denying the State's motion for summary judgment on the issue of effect. The State filed a notice of interlocutory appeal to this Court on July 28, 1982.

U.S. 1050 (1980) and the precedential value it placed on the dissenting opinion filed on summary affirmance by this Court. In *Mississippi* v. *United States*, the legislative apportionment enacted in 1978 was the subject of Section 5 analysis. While that suit was pending in the District of Columbia, the local federal court in Mississippi ordered into effect a settlement plan to be implemented if the legislature's plan was not precleared. The Section 5 court used this court-ordered interim plan as the benchmark, reasoning that it was the existing level of minority voting strength. It noted, however, that the plan before the court would not be retrogressive as compared to any of the suggested benchmarks. 490 F. Supp. at 582, n. 6. On appeal, the Supreme Court affirmed without opinion. Mr. Justice Stevens wrote an opinion concurring in the judgment in which he criticized the use of the interim plan as a benchmark. Justice Stevens argued that the court-ordered interim plan, while technically the *existing plan*, did not represent *existing minority voting strength* since no elections were ever held pursuant to that interim plan. Mr. Justice Marshall dissented, because he thought that the legislative enactment retrogressed from the interim plan which he found to be the appropriate benchmark.

The decision of the lower court in *Mississippi* v. *United States* and the lack of a majority opinion on appeal has created confusion as to the proper benchmark to be applied in Section 5 litigation where an interim plan has been ordered into effect by the local court while the Section 5 case is pending. A resolution of the present case requires clarification of this issue.

Moreover, the State of Mississippi is now in the untenable and wholly illogical position of proving to the Section 5 Court, lack of retrogression from a standard created

after the enactment of S.B. 2001. If the district court's decision is permitted to stand, covered jurisdictions would be well-counselled to discard all their computers and invest in crystal balls.

I. A Covered State Has The Right To Have Its Legislature's Congressional Redistricting Plan Implemented On An Interim Basis While Preclearance Is Pending, Where The State Has Timely And In Good Faith Endeavored To Comply With Section 5 Requirements.

Under Section 5 of the Voting Rights Act, a covered jurisdiction may not implement any change in voting standards, practice, or procedure without prior scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment. While Section 5 permits a covered state to fulfill this preclearance requirement by submission of new legislation to the Attorney General, the Attorney General is not the final arbiter of non-compliance. The controversy between the Federal Government and the State wishing to implement its legislation remains after an objection has been interposed. The appropriate resolution of this controversy is a judicial determination of whether suspension of the new rule is necessary to vindicate rights guaranteed by the Fifteenth Amendment. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 335 (1966).

In the present case, the order of the district court denies Mississippi its statutory remedy of a judicial determination of whether S.B. 2001 complies with the Voting Rights Act. In the Section 5 action filed in the District of Columbia, the State has prepared to prove that S.B. 2001 did not have a discriminatory effect as compared to the existing districts. The existing districts were precleared in 1972 and S.B. 2001 essentially reenacts the 1972 configuration. Moreover, S.B. 2001 slightly en-

hances black voting strength in spite of an actual statewide decline in black population. In view of this enhancement, and the similarity between the previously precleared districts and S.B. 2001, the State moved for summary judgment on the issue of discriminatory effect based on the retrogression standard enunciated in *Beer* v. *United States*, 425 U.S. 130 (1976). On June 28, 1982, the Section 5 court ruled that the standard by which to measure retrogression was not the 1972 plan but the interim court plan, insofar as that plan now represents existing black voting strength. (Appendix F.)

The result of the lower court's imposition of the Simpson plan has been to change the controlling legal standard in the midst of the Section 5 litigation. Neither the Committee nor the Legislature could have reasonably foreseen this result. It is devoid of all reason to charge the Legislature with the responsibility of insuring that their redistricting plan will not represent a retrogression from any potential, but as yet non-existent, interim plan.

Section 5 does not itself preclude the implementation of a Legislature's unprecleared plan on an interim basis. The authority of the district court to enjoin the use of such statutes is discretionary. *Perkins* v. *Matthews*, 400 U.S. 379 (1971) at 396-97. In *Georgia* v. *United States*, after the Attorney General objected to a Georgia reapportionment statute the local federal court enjoined the holding of elections under those plans. 411 U.S. 526 (1973). This court entered a stay of the injunction which permitted the State to conduct one election under the challenged plan pending appeal.

Relying on the *Georgia* precedent, a three-judge court in the District of Columbia stated: "The Supreme Court has recognized the equitable power of the district courts to permit enforcement of such statutes *pendente lite* not-

withstanding Section 5." *Horry County* v. *United States*, 449 F. Supp. 990 (D.D.C. 1978). Again, in *Berry* v. *Doles*, this Court indicated that the district court can deny a Section 5 injunction especially where permitting the use of the unprecleared plan cannot abridge or deny anyone's rights. 434 U.S. 191 (1978). *See also Heggins* v. *City of Dallas*, 469 F. Supp. 739 (N.D. Tex. 1979). Recently, in *Burton* v. *Hobbie*, Civil No. 81-617-N (M.D. Ala. June 21, 1982), a three-judge district court exercised its authority to order the temporary implementation of a legislative reapportionment plan to which the Attorney General had objected.

The district court erred in failing to implement S.B. 2001 for the 1982 Congressional elections. Because the configuration of S.B. 2001 is identical to the 1972 enactment, the position of the plaintiffs would not be changed by the operation of the new statute. Implementation of S.B. 2001 would do no more than maintain the political status quo until the Section 5 issue has been resolved.

The denial of the State's right to fashion its own political affairs is especially harsh and unwarranted in this case. First, the entire legislative process which culminated in S.B. 2001 was directed towards compliance with the Voting Rights Act. The decision to enact S.B. 2001 was based on the Legislature's reasonable, good faith belief that since the existing district lines had met constitutional and Section 5 muster, the new bill should not stray far from those lines. Second, the State of Mississippi has continued to make extraordinary progress in the area of minority voting rights. The State today has more elected black officials than any state in the nation. Joint Center for Political Studies, National Roster of Black Elected Officials, Vol. 10 (1981). The number of blacks registered to vote of those eligible is nearly 70%, the

highest black registration among the covered states. U.S. Department of Commerce, Bureau of the Census, Registration and Voting in November, 1976—Jurisdictions Covered by the Voting Rights Act, series P-23, No. 74 (1978), tables 1 and 2. The Legislature, which enacted S.B. 2001 has 17 black members as compared to 4 in 1978. *Mississippi* v. *United States*, 490 F. Supp. 569, 575 (S.D. Miss. 1979).

Finally, the State did everything possible to complete the preclearance process in time for the orderly progress of the 1982 elections. The Committee was formed and initial preparation begun months before the Census Bureau made the necessary data available to the States. The Committee worked as quickly as possible while still allowing sufficient advance notice of public hearings. A special session of the Legislature was called in order to enact a bill and make a timely submission. And, that submission was complete. The additional information requested by the Attorney General on the 60th day after submission was not required by the regulations. The State honored the request and for its efforts to aid the Attorney General was rewarded with another 60 day wait. Mississippi was not tardy, negligent, or inattentive to its statutory responsibility. Once the Justice Department decided that the administration of Section 5 was as changeable as Assistant Attorney Generals, no action by the state could have secured preclearance in time for the 1982 elections.

The Mississippi Legislature justifiably relied on established precedents in drafting S.B. 2001 to meet the substantive requirement that a change in voting laws not result in a retrogression in minority voting strength. The Legislature then diligently endeavored to obtain timely preclearance of the bill in accordance with the procedural directives of Section 5. In view of these factors, even temporary interference with the state's political program

is patently injust. The alternative, maintenance of the status quo pending preclearance, makes it wholly unnecessary.

II. The Objection Of The Attorney General, Which Is Not Dispositive Of The Issue Of Section 5 Compliance Because The State Has Filed An Action For Declaratory Judgment, Does Not Constitute A Statutory Defect Which A Local Federal Court Must Address In Fashioning Interim Relief.

This Court has given clear instruction that where a federal court is called upon to review a redistricting plan, it must fashion a remedy which rectifies only specific constitutional or statutory deficiencies. *White* v. *Weiser*, 412 U.S. 783 (1973); *Sixty-Seventh Minnesota State Senate* v. *Beens*, 406 U.S. 187 (1972); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). Most recently in *Upham* v. *Seamon*, ___ U.S. ___ (1982), the Court reiterated that a district court may not substitute its own constitutionally and statutorily superfluous preferences for those of the Legislature. Proven violations of the Fourteenth and Fifteenth Amendments and the Voting Rights Act fix the outer boundaries of judicial authority to alter duly-enacted redistricting legislation.

In *Upham*, the district court properly addressed the objections of the Attorney General in order to bring the rejected plan into statutory compliance. In that case, the Texas Legislature accepted the determination of the Justice Department as final and did not pursue its right to a declaratory judgment.

Because of the State's acquiescence, the Attorney General became the final arbiter of the statutory deficiency of the Texas Congressional redistricting plan. In Mississippi's case, however, the Legislature decided to file suit immediately upon receipt of the objection letter. Thus, at the time of the district court's decision below, no

statutory defect had been finally adjudicated. Absent a specific final statutory defect the remedial action of the district court below amounts to nothing more than the sort of social engineering by the judiciary which is prohibited by *Upham*.

The court below properly eliminated the Kirksey plans insofar as there was no constitutional or statutory compulsion to create a 65% black district.[4] *White* v. *Regester*, 412 U.S. 755 (1973); *Wyche* v. *Madison Parish Police Jury*, 635 F.2d (5th Cir. 1981). Appendix A at 14a. In choosing the Simpson plan, however, the court made only a cosmetic change in the racial composition of District 2, but substantially altered the Legislature's political design as well. The only justification for this interference was the fact that S.B. 2001 remained unprecleared. It is settled that the State cannot implement unprecleared legislation; likewise, the local federal court cannot adjudiate the Section 5 issue, or the constitutional issue prior to preclearance. But where the preservation of legitimate state policy necessitates, the district court should exercise its authority to implement the Legislature's plan pending preclearance. *Upham* v. *Seamon*, ____ U.S. ____ (1982), *White* v. *Weiser*, 412 U.S. 783 (1973).

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[4] The Appellants' contention that it would require a district at least 65% black to elect a black Congressman has been totally discredited by the primary election results. Robert Clark, a black state legislator, won the Democratic nomination in the "Simpson" Second District. Mr. Clark received 57% of the vote in a district containing a black voting age population of less than 50%. Jackson *Clarion-Ledger*, August 18, 1982.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

WILLIAM ALLAIN
Attorney General, State of Mississippi

*JERRIS LEONARD
KATHLEEN HEENAN
JERRIS LEONARD & ASSOCIATES, P.C.
900 17th Street, N.W., Suite 1020
Washington, D.C. 20006
(202) 872-1095

CHAMP TERNEY
HUBBARD T. SAUNDERS, IV
NICKI MARTINSON
1164 Deposit Guaranty Plaza
Jackson, Mississippi 39201

R. SCOTT LEVANWAY
727 N. President Street
Jackson, Mississippi 39202

Attorneys for Appellees/Cross-Appellants
**Counsel of Record*

APPENDIX A

District Court Decision and Order

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI GREENVILLE DIVISION

No. GC 82-80-WK-O

DAVID JORDAN and SAMMIE CHESTNUT, On Behalf of the Greenwood Voters Leage, Individually and on Behalf of others similarly situated,

Plaintiffs

v.

WILLIAM WINTER, Governor of Mississippi; T. H. CAMPBELL, III, Chairperson, BILL HARPOLE, Vice-Chairperson, J. C. "CON" MALONEY, Secretary, Joint Congressional Redistricting Committee; BRAD DYE, Lieutenant Governor of Mississippi and President of the Senate; and CLARENCE B. "BUDDIE" NEWMAN, Speaker of the House of Representatives,

Defendants

No. GC 82-81-WK-O

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLES MCLAURIN, SAMUEL MCCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of all others similarly situated,

Plaintiffs

v.

WILLIAM F. WINTER, Governor of Mississippi, WILLIAM A. "BILL" ALLAIN, Attorney General of Mississippi, EDWIN LLOYD PITTMAN, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Defendants

(June 8, 1982)

Before CLARK, Circuit Judge, and KEADY and SENTER, District Judges.

PER CURIAM:

Plaintiffs bring class actions on behalf of Mississippi residents and registered voters and the state's black residents and voters to (1) enjoin enforcement of the state's 1981 congressional redistricting plan until it is precleared under § 5 of the Voting Rights Act (42 USC § 1973c); (2) prohibit further use of Miss. Code Ann. § 23-5-223 (1972), the state's existing congressional plan, because of population malapportionment allegedly violative of Art. 1, § 2 and the fourteenth amendment to the United States Constitution; and (3) secure a court-ordered plan for the 1982 elections for members of the United States House of Representatives, and thereafter until changed by law. Defendants are the state's governor, attorney general, secretary of state, state board of election commissioners and the Republican and Democratic state executive committees which are responsible for conducting the primary and general elections for the United States House of Representatives in Mississippi.

The court has jurisdiction pursuant to 28 USC §§ 1331 and 1343 and 42 USC § 1973j(f), and a three-judge district court has been properly convened pursuant to 28 USC § 2284.

In August 1981 the Mississippi Legislature enacted S. B. 2001, also known as 1981 Mississippi Laws (Extraordinary Sess.) Ch. 8, for redistricting the state's five congressional districts and thereafter submitted it to the Attorney General of the United States for § 5 preclearance. After requesting additional information, the Attorney General interposed timely objection on March 30, 1982. Although the state legislature was in session when the objection was received, it adjourned several days later

without enacting another plan or further attempting to obtain preclearance from the Attorney General. Instead, on April 7, the state filed a declaratory judgment action in the United States District Court for the District of Columbia, seeking judicial preclearance of S. B. 2001. Mississippi v. Smith, No. 82-0956. This court has been notified that the declaratory judgment action, in which plaintiffs have intervened, will not be heard until mid-July. Since by Mississippi law, the 1982 congressional primaries were set for June 1 with runoff primary June 22, this court on April 26 found it necessary to order indefinite postponement of the current year's congressional primary pending expedited hearing on issues relevant to formulation of an interim court-ordered plan.

The parties are in agreement that the present circumstances require the court to adopt an interim redistricting plan effective until S. B. 2001 is precleared or an alternate plan is enacted by the state legislature and precleared under § 5. Admittedly, Mississippi is a covered jurisdiction under § 5 of the Voting Rights Act, and S. B. 2001 is a change in standards, practices or procedures with respect to voting within the meaning of § 5. The parties, however, vigorously disagree on what plan should be adopted by the court as an interim congressional redistricting plan.

During a two-day hearing on May 13 and 14, the court received stipulations, oral and documentary evidence and heard oral argument. Briefs of all concerned parties having been filed, we incorporate herein findings of fact and conclusions of law required by Rule 52(a), F. R. Civ. P.

I.

According to the 1980 official census, Mississippi has a total population of 2,520,638, of which approximately 35% are black. Since the state elects five members of the United States House of Representatives, the norm, or ideal population size for a congressional district is 504,-

128. Because of notable population shifts that have occurred throughout the state since 1970, the districts formed by the existing 1972 plan have a total population variance of 17.6%. The following table reflects the 1980 population, existing extent and percent of deviation, and percentage of minorities in the five 1972 districts:

Dist. No.	Total Pop.	Deviation	% Deviation	Black %
1	495,709	8,419	−1.67	29.90
2	460,780	43,348	−8.60	45.25
3	514,218	10,090	+2.00	37.87
4	500,329	3,799	−0.75	45.37
5	549,602	45,474	+9.02	19.78

In recognition of this disparity, the legislature in 1980 established a joint Senate-House Committee for Congressional Redistricting (Joint Committee), chaired by Representative Thomas H. Campbell, III, which converted census population data into the state's election precincts, conducted eight public hearings around the state and received the views and proposals of interested groups and individuals. Included among the submitted proposals were a number of plans advocated by legislators and citizens of both races. The plans submitted by blacks proposed joining the black majority counties in the northwest portion of the state known as the "Delta area" to other territory to create a black majority district, ranging from 52.1% to 65.81%.[1]

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[1] The Mississippi Delta consists of 19 Delta and part-Delta contiguous counties as follows: Bolivar, Carroll, Coahoma, DeSoto, Grenada, Holmes, Humphreys, Issaquena, Leflore, Panola, Quitman, Sharkey, Sunflower, Tallahatchie, Tate, Tunica, Warren, Washington, and Yazoo. This is a distinct geographical area of the state traditionally featuring an agricultural economy concerned with flood control of the Mississippi River. The geography of the Delta has been colorfully and somewhat accurately described as "beginning in the lobby of the Peabody Hotel at Memphis, Tennessee, and ending at Catfish Row in Vicksburg, Mississippi." Since early times,

The Joint Committee recognized that the population variances had to be eliminated, but a majority of its members concluded this could be satisfactorally accomplished without diluting black voting strength by rearranging district lines to avoid incumbent congressmen from running against each other and by transferring only six counties and portions of four counties across district lines. Although Mississippi's congressional districting plans from 1882 to 1966 had contained a district encompassing most of the Delta counties, the committee did not feel obligated to voluntarily create a black majority district with a configuration different from the 1972 lines that had been previously precleared.[2]

The record further reflects that the Joint Committee disapproved any major change of the district lines and recommended a plan, the essence of which was enacted by the legislature as S. B. 20001 [sic], which achieved a population variance of .0422 by splitting four counties into adjacent districts (K-27). The stipulated data as to the total population, deviation, percentage of deviation, and percentage of total minority population[3] in the S. B. 2001 districts follow:

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concentrations of blacks have resided in the Delta area. In fact, of the 21 black majority counties in Mississippi, 14 are located in the Delta.

[2] In 1966, the legislature first adopted a plan dividing the north and north-central portions of the state by drawing east/west lines generally across the state which segmented black majority Delta counties into three districts. Civil rights plaintiffs' challenge of the plan as a racial gerrymander violative of the fifteenth amendment was turned down in Connor v. Johnson, 279 F. Supp. 619 (S.D. Miss. 1966), aff'd. 386 US 483, 18 L Ed 2d 224 (1967). The 1966 plan was in fact never submitted and precleared in accordance with § 5. In 1972, the legislature substantially reenacted the 1966 plan, adjusting only for population variances. On May 10, 1972, the Attorney General precleared the 1972 act, which was utilized without challenge for five congressional elections.

[3] Black voting age population is approximately 5% lower than total population figures.

District	Total Population	Deviation	% Deviation	Black %
1	504,107	− 21	−.0042	29.79
2	504,024	−104	−.0206	47.95
3	504,237	+109	+.0216	33.38
4	504,123	− 5	−.0010	45.32
5	504,147	+ 19	+.0038	19.54

S. B. 2001 was objected to by the Attorney General on the ground it divided the black majority Delta and part-Delta counties among Districts 1, 2 and 3 rather than concentrating them in a single district and concluded there had been unlawful dilution of minority voting strength.[4] The Attorney General was of the view that the legislature's reliance upon the 1972 precleared plan was misplaced, and stated that while no objection to the 1972 plan was timely interposed, this was the result of an er-

[4] The Attorney General's objection letter stated in part:

Our analysis shows that, according to 1980 Census data, the State is authorized five congressional districts and has a population which is 35.2 percent black. The black population in large part still is concentrated in the Delta region. District Nos. 1, 2 and 3 of the reapportionment plan have been drawn horizontally across the majority-black Delta area in such manner as to dismember the black population concentration and effectively dilute its voting strength.

Alternate proposals were presented to the reapportionment body which would have avoided the fragmentation and dilution of minority voting strength in the Delta area, and we have received complaints that such alternate proposals were rejected for racially discriminatory reasons. Our own review has revealed that, in fact, reasonable alternatives could be drawn which would avoid the fragmentation and dilution of minority voting strength in the Delta area and the State's submission offers no satisfactory explanation for, or governmental interest in, the rejection of such alternatives. The adoption of the east-west configuration of the proposed plan, instead of a configuration which recognizes the Delta as a community of interest, suggests to us an unnecessary retrogression in the position of black voters in Mississippi.

Accordingly, we are unable to conclude that the submitted plan meets the requirements of the Act in its treatment of the Delta area. I must, therefore, on behalf of the Attorney General, interpose an objection to Senate Bill No. 2001 pursuant to Section 5 of the Voting Rights Act of 1965.

roneous determination by his office that the Supreme Court's summary affirmance in Connor v. Johnson, 386 US 483, 18 L ed 2d 224 (1967), was entitled to deference as to the § 5 issues.

Since it is apparent that the population deviations in congressional districts can be easily alleviated, the essence of the dispute centers around claims of dilution of black voting strength. Plaintiffs urge the court to adopt an interim plan with one district containing approximately 65% black majority population. To achieve this purpose, they have submitted two proposals, both of which were devised by Senator Henry J. Kirksey, a black legislator. The primary Kirksey plan (K-30) has a 64.37% black majority district and a total population variance of .2150%. This plan splits five counties, including populous Hinds County, from which a portion of the City of Jackson is combined with 14 Delta and part-Delta counties or segments thereof and with additional counties to form the black majority district. The following table presents the data concerning this plan.

District	Total Population	Deviation	% Deviation	% Blacks
1	504,219	+ 92	+.0182	25.60
2	503,436	−691	−.1371	64.37
3	504,530	+403	+.0799	32.49
4	504,035	− 92	−.0182	33.83
5	504,418	+291	+.0577	19.75

The "fall-back" Kirksey plan (P. Ex. 15) urged by plaintiffs has a 65.81% black majority district and a total population variance of .230%; it splits five counties, including Hinds County, which is divided among three districts. The majority black district in this plan combines portions of the Cities of Jackson and Vicksburg with 15 Delta and part-Delta counties, or segments thereof. Pertinent data on the plan follow:

District	Total Population	Deviation	% Deviation	Black %
1	503,642	−486	−.096	25.72
2	504,926	+798	+.158	65.81
3	503,762	−366	−.072	30.36
4	504,261	+133	+.026	33.70
5	504,047	− 81	−.016	20.33

In addition to the two Kirksey plans, the Joint Committee had before it many other plans submitted by various legislators and citizens, including several plans developed by the committee staff on motion of Representative James C. Simpson, which resulted in a plan referred to as the "Simpson amendment" (K-26). This plan, urged by AFL-CIO, as amicus curiae, has a total deviation of .2141%, and contains a district (District 2) which combines 15 Delta and part-Delta counties with six eastern rural counties to produce a 53.77% black majority district. Another district (District 4) has a 45.25% black district. The Simpson amendment only splits two rural counties and received considerable support in a floor vote occuring in the state House of Representatives. Miss. House Journal, Extraordinary Sess. 1981, p. 30. This plan is depicted below.

District	Total Population	Deviation	% Deviation	Black %
1	504,671	+543	+.1077	25.86
2	504,697	+569	+.1128	53.77
3	503,760	−368	−.0729	31.23
4	503,893	−235	−.0466	45.25
5	503,617	−511	−.1013	19.84

Other plans considered but rejected by the legislature have not been urged for adoption by this court. The state officials, however, urge implementation as an interim plan of S. B. 2001, the existing 1972 redistricting plan, or a plan to be drawn by the court only slightly modifying either one of the preceding two.

II.

All parties agree that under § 5 and decisional precedent, this court serves only a limited function in congressional redistricting cases. Our task becomes an "unwelcome obligation" to prescribe an interim plan which will be effective merely until a redistricting plan adopted by the state can lawfully be used in its place, i.e., until either the District of Columbia court renders declaratory judgment upholding S. B. 2001 or the Mississippi legislature enacts another redistricting plan which is precleared under § 5. Moreover, notwithstanding a suggestion in McDaniel v. Sanchez, —— US ——, 68 L ed 2d 724, 739 (1981), that a federal district court should fashion its own plan, this court lacks the time, ability, and record basis to independently create a plan which could be implemented with sufficient promptness to allow the orderly conduct of the 1982 congressional primary and general elections. These limitations thus require us to choose from among the several plans urged for adoption in these proceedings. *Cf.* Terrazas v. Clements, —— F. Supp. ——, slip op. at 13-14 (N.D. Tex., March 24, 1982) (three-judge court).

Mississippi is precluded by the express terms of § 5 from implementing S. B. 2001 so long as it remains unprecleared. *See* Allen v. State Board of Elections, 393 US 544, 22 L ed 2d 1 (1969); Connor v. Waller, 421 US 656, 44 L ed 2d 486 (1975); Dotson v. City of Indianola, 521 F. Supp. 934 (N.D. Miss. 1981) (three-judge court). Section 5, however, does not by its terms prohibit a federal district court from utilizing, on an interim basis, an unprecleared plan. Indeed, it would be a rare case in which a federal court, compelled to devise an interim redistricting plan, would have opportunity to place into effect a plan that had been precleared under § 5. Although circumstances might arise in which a federal court could order, on an interim basis, implementation of an unprecleared legislative plan, we conclude that any action by

this court to so order S. B. 2001 into effect would be an injudicious exercise of our equitable remedial power. We base this view on several factors indisputably present in this case.

When S. B. 2001 was submitted, it was specifically objected to by the Attorney General, who concluded that it violated § 5. Insofar as this court's interim plan-making task is controlled by the Voting Rights Act, we may not substitute our judgment for that of the Attorney General. Perkins v. Matthews, 400 US 379, 27 L ed 2d 476 (1971). The proceedings under that Act which the State of Mississippi has instituted in the District Court of the District of Columbia will determine whether S. B. 2001 passes statutory muster for permanent use. It would be both inappropriate and unseemly for us to implement on a temporary basis the plan which those proceedings seek to preclear since we have other plans which will allow us to order temporary redistricting which adequately reconciles state political policy with federal statutory and constitutional standards. For these reasons the court rejects the defendants' suggestion that S. B. 2001 may be used on an interim basis. We expressly refrain from any action which may be viewed as indicating a position on either side of the issues pending in the District Court for the District of Columbia.

As to the existing 1972 congressional plan, the command of Art. 1, § 2 of the United States Constitution is that representatives be chosen "by the People of the several States." That article permits only those population variances among congressional districts that are "unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." Kirkpatrick v. Preisler, 394 US 526, 531, 22 L ed 2d 519, 525 (1969); Wesberry v. Sanders, 376 US 1, 11 L ed 2d 481 (1964). Under admitted facts, the state's existing plan with a 17.6% population variance renders it grossly malapportioned, and since it is readily apparent that this degree

of malapportionment is not unavoidable, we declare it to be unconstitutional, and plaintiffs are entitled to summary judgment on that issue as a matter of law.[5] Since plans with substantially lower population variances are available for use, implementation of the 1972 plan, even on an interim basis, would be without justification, and defendants' contention that the 1972 plan be used temporarily is not constitutionally permissible.[6] Accordingly, our decision is narrowed to consideration of the two Kirksey plans and the Simpson amendment proposal.

In determining which plan to place into effect as an interim plan, we must "reconcil[e] the requirements of the Constitution with the goals of state political policy." Connor v. Finch, 431 US 407, 414, 52 L ed 2d 465 (1977). Moreover, *McDaniel, supra*, compels us to consider § 5 criteria. Thus, any plan adopted by this court as a temporary method of ensuring upcoming elections cannot violate Art. 1, § 2, the fourteenth amendment, or the Voting Rights Act. In particular, such a plan must satisfy the one person, one vote rule and avoid any dilution of minority voting strength. The three plans before us comply with these federal considerations and no tenable argument could otherwise be made. Since federal standards are met, we must now analyze each plan in light of the state's political policies.

We are guided by the Supreme Court's recent decision in Upham v. Seamon, —— US ——, 71 L ed 2d 725 (1982). In *Upham*, the Court clearly held that, in fashioning an interim reapportionment order, a district court

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[5] *See Kirkpatrick, supra* (invalidating plan with variance of 5.97%) and Wells v. Rockefeller, 394 US 542, 22 L Ed 2d 535 (1969) (variance of 13.1% invalid).

[6] This is not a case such as *Wells, supra*, and Kilgarlin v. Hill, 386 US 120, 17 L ed 2d 771 (1967), wherein the courts were required, because of exigent circumstances, to implement malapportioned redistricting plans. In the case sub judice, plans with much lower population variance are readily available.

must adhere to the state's political policies except to the extent such policies are violative of either the Constitution or the Voting Rights Act. *See also*, White v. Weiser, 412 US 783, 795, 37 L ed 2d 335, 346 (1973). As adduced at trial, the state's primary political policies reflected in the passage of S. B. 2001 may be summarized as follows: (1) minimal change from 1972 district lines; (2) least possible population deviation; (3) preservation of the electoral base of incumbent congressmen; and (4) establishment of two districts with 40% or better black population. As to the latter policy, the majority of the Joint Committee and legislature subscribed to the belief that a plan with two minority districts containing at least 40% black population was preferable to a plan that sacrificed two such "high impact" minority districts for one district with a significant black majority. The prevailing legislative view was that in order to ensure a congressman's responsiveness to the needs and interests of black citizens, the district should be at least 40% black whenever possible; any lesser percentage, in its view, would likely result in insensitivity to the black constituency.

In determining the validity vel non of these state policies, we note the Attorney General's conclusion that the state's action in drawing lines for Districts 1, 2 and 3 from east to west violated § 5 by unlawfully diluting black voting strength. Since the validity of that determination lies at the heart of the proceedings now pending in the District Court of the District of Columbia, we simply accept that decision for the purposes of this ruling without any indication of a view on its merits. No one argues that the second and third policies offend either the Constitution or the Voting Rights Act. As to the last factor, plaintiffs contend only that one 65% black majority district would better serve the interests of blacks than would two 40% or better black population districts since a 65% black district is more likely to assure election of one black congressman. However, we are bound by the

legislative preference for two high black impact districts unless that determination violates constitutional or statutory mandates. We emphasize that it is not our function to substitute our judgment for the state's political program in this respect, absent federal invalidity. We find no federal bar to this aspect of the state's political objective.

At the outset, we note that neither the Constitution nor the Voting Rights Act requires proportional representation. City of Mobile v. Bolden, 446 US 55, 64 L ed 2d 47 (1980); White v. Regester, 412 US 755, 37 L ed 2d 314 (1973). What is required is that the state deal fairly with its black citizens by avoiding any scheme that has the purpose or effect of unnecessarily minimizing or fragmenting black voting strength. *White v. Regester, supra.* As noted by the District of Columbia Court in State of Mississippi v. United States, 490 F. Supp. 569, 582 (D.D.C. 1979) (three-judge court), *aff'd mem.* 444 US 1050 (1980), in applying § 5 criteria: "No state or political subdivision is required to search for ways to maximize the number of black voting age population districts. Likewise, no racial group has a constitutional or statutory right to an apportionment structure designed to maximize its political strength." Moreover, the Fifth Circuit has recognized that "the realities of partisan politics may enable a minority in some circumstances to exact more political concessions by swinging its vote to one of two candidates whose majority-race following is approximately equal than it could by electing a candidate of his own identity." Wyche v. Madison Parish Police Jury, 635 F. 2d 1151, 1160 (5 Cir. 1981). And "[a] court-ordered racial gerrymander which would assure that blacks form a sizeable electoral majority in a single district may not be nearly as effective a guarantee of access as the creation of two or more districts with substantial black voter populations such that all candidates in those districts must be responsive to the needs and aspirations

of the black electorate." United States v. Board of Supervisors of Forrest County, 571 F. 2d 951, 956 (5 Cir. 1978). Since the establishment of a "safe" minority seat is not a federal prerequisite of a reapportionment plan, *Wyche, supra*, at 1161, we conclude that the state's policy of favoring 40% or better black population districts was legitimate.

A consideration of these legitimate state political policies compels us to adopt, as an interim redistricting plan, the Simpson amendment. The Kirksey plans are repugnant to valid state policies inasmuch as they erode the electoral bases of incumbent congressmen in Districts 2 and 4, contain a larger population variance than the Simpson amendment, and disregard the state's policy of creating two high black impact districts. Moreover, these plans represent an obvious racial gerrymander by running a line from District 2 partially into metropolitan Hinds County and the City of Jackson solely to include a large and overwhelming black population corridor having little in common with the rest of what is essentially a rural district.

The Simpson amendment, on the other hand, more nearly satisfies the state's criteria by: (1) preserving constituencies of incumbents; (2) maintaining a population deviation of only .2141%; and (3) creating two 40% or better black districts. In addition, the Simpson amendment accords with racial fairness by including a majority black district of 53.77% centered in the Delta area. Plaintiffs challenge that the Simpson amendment or any other plan without a 65% or better black majority district violates the § 5 standard against retrogression of minority voting strength, relying upon Beer v. United States, 425 US 130, 47 L ed 2d 629 (1976). We reject this argument which is based upon the premise that the correct benchmark for measuring retrogression is former District 3, as it existed in the 1956 plan, and containing 11 Delta counties having a 65.51% black majority under

1960 census figures. Laying aside the state's position that retrogression should be determined by comparison with the 1972 plan, it is clear that since the Voting Rights Act became effective on November 1, 1964, retrogression must be determined in accordance with district lines existing no earlier than that date. The plan then in effect, i.e., the 1962 plan, contained the same Delta counties as the 1956 plan, combined with 13 other counties to form old District 2, which then had a 59.29% black majority population. Of course, if the district lines in effect on November 1, 1964, had never been changed, § 5 retrogression could not be implicated, even if there was a reduction in the percentage of blacks residing in former District 2. Computations show that, under 1980 census figures, the formerly 59.29% black majority district is now comprised of only 48.09% black population. Thus, the Simpson amendment with a 53.77% majority district represents an augmentation, rather than diminution, of black voting strength.

Other significant advantages inherent in the Simpson amendment are that it splits only two sparsely settled counties along established precinct lines, preserves a high degree of community of interest in all five districts, including the black majority District 2 which is chiefly an agricultural area, and satisfies concepts of contiguity and compactness. It is equitable that these considerations be taken into account in choosing a plan. We therefore find that the Simpson amendment most nearly satisfies constitutional and statutory constraints while reconciling state political policy, and direct it be used by the State of Mississippi pending preclearance of a statutorily permissible plan.

Accordingly, the court hereby establishes congressional districts for primary and general elections for 1982, and thereafter until a plan is precleared by the State under § 5 of the Voting Rights Act, as follows:

District No. 1 shall consist of the following counties and parts thereof: DeSoto, Tate, Panola, Tallahatchie (all except the precincts of Phillip, Leverette and Cascilla), Marshall, Lafayette, Yalobusha, Grenada, Calhoun, Benton, Tippah, Union, Pontotoc, Chickasaw, Alcorn, Tishomingo, Prentiss, Lee, Itawamba and Monroe.

District No. 2 shall consist of the following counties and parts thereof: Tunica, Coahoma, Quitman, Bolivar, Washington, Sunflower, Tallahatchie (precincts of Phillip, Leverette and Cascilla), Leflore, Carroll, Montgomery, Webster, Choctaw, Attala, Leake, Madison, Holmes, Humphreys, Yazoo, Sharkey, Issaquena and Warren.

District No. 3 shall consist of the following counties and parts thereof: Clay, Oktibbeha, Lowndes, Winston, Noxubee, Neshoba, Kemper, Rankin, Scott, Newton, Lauderdale, Simpson (all except the precincts of Harrisville, Pearl, Fork Church and Bridgeport), Smith, Jasper, Clarke and Jones.

District No. 4 shall consist of the following counties and parts thereof: Hinds, Claiborne, Copiah, Jefferson, Adams, Franklin, Lincoln, Lawrence, Jefferson Davis, Wilkinson, Amite, Pike, Walthall, Marion, Simpson (precincts of Harrisville, Pearl, Fork Church and Bridgeport).

District No. 5 shall consist of the following counties: Covington, Wayne, Lamar, Forrest, Perry, Greene, Pearl River, Stone, George, Hancock, Harrison and Jackson.

The boundaries of all counties and precincts mentioned above shall be such boundaries as they existed on July 1, 1981. A map depicting the aforesaid plan is appended to this opinion.

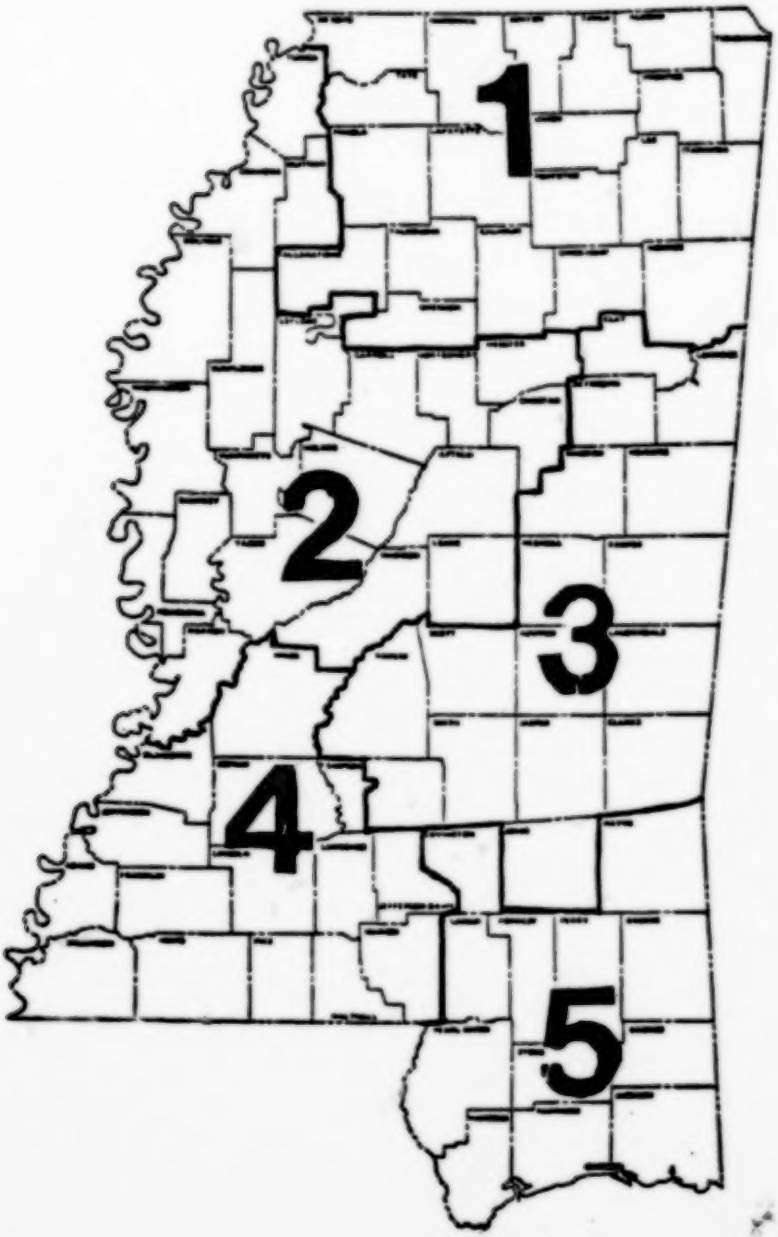
Furthermore, the court, after considering the time requirements for candidate qualification and campaigning, and to prepare for the orderly conduct of the 1982 con-

gressional primary and general elections, orders into effect the following schedules:

July 13, 1983 at 6 p.m.	Deadline for candidate qualification for primaries
August 17, 1982	First Primary
August 31, 1983 [sic]	Second Primary
September 14, 1982 at 6 p.m.	Deadline for independent candidate qualification
November 2, 1982	General election.

Our order shall also specify further election procedures applicable to the 1982 congressional primary and general elections.

COURT-ORDERED INTERIM CONGRESSIONAL REDISTRICTING PLAN



IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI GREENVILLE DIVISION

No. GC 82-80-WK-O

DAVID JORDAN and SAMMIE CHESTNUT, On Behalf of the Greenwood Voters Leage, Individually and on Behalf of others similarly situated,

Plaintiffs

v.

WILLIAM WINTER, Governor of Mississippi; T. H. CAMPBELL, III, Chairperson, BILL HARPOLE, Vice-Chairperson, J. C. "CON" MALONEY, Secretary, Joint Congressional Redistricting Committee; BRAD DYE, Lieutenant Governor of Mississippi and President of the Senate; and CLARENCE B. "BUDDIE" NEWMAN, Speaker of the House of Representatives,

Defendants

No. GC 82-81-WK-O

OWEN H. BROOKS, SARAH H. JOHNSON, REV. HAROLD R. MAYBERRY, WILLIE LONG, ROBERT E. YOUNG, THOMAS MORRIS, CHARLES MCLAURIN, SAMUEL MCCRAY, ROBERT JACKSON, REV. CARL BROWN, JUNE E. JOHNSON, and LEE ETHEL HENRY, individually and on behalf of all others similarly situated,

Plaintiffs

v.

WILLIAM F. WINTER, Governor of Mississippi, WILLIAM A. "BILL" ALLAIN, Attorney General of Mississippi, EDWIN LLOYD PITTMAN, Secretary of State of Mississippi, in their official capacities and as members of the Mississippi State Board of Election Commissioners, STATE BOARD OF ELECTION COMMISSIONERS, MISSISSIPPI DEMOCRATIC EXECUTIVE COMMITTEE, MISSISSIPPI REPUBLICAN EXECUTIVE COMMITTEE,

Defendants

ORDER

A three-judge court having been convened pursuant to law to hear the above consolidated actions, and after trial having decided the issues in accordance with Memorandum Opinion this date released, it is

ORDERED

1. S. B. 2001, also known as 1981 Mississippi Laws (Extraordinary Sess.) Ch. 8, a statute providing for the redistricting of Mississippi's five congressional districts for the election of members of the United States House of Representatives, is legally unenforceable until it has been precleared in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c, and the above named defendants are hereby enjoined from implementing or seeking to implement such statute for election of members of the United States House of Representatives for Mississippi until it has been so precleared.

2. Miss. Code Ann. § 23-5-223 (1972), which prescribes the existing congressional districting plan for the State of Mississippi, is declared unconsitutional as violative of Art. 1, § 2, and the fourteenth amendment to the United States Constitution, and the above named defendants are hereby enjoined from hereafter enforcing or seeking to enforce said statute for election of members of the United States House of Representatives for Mississippi.

3. There is hereby ordered into effect an interim plan establishing congressional districts for primary and general elections for 1982, and thereafter until a redistricting plan enacted by the State of Mississippi is precleared in accordance with § 5 of the Voting Rights Act of 1965, as amended, 42 USC § 1973c, as follows:

> District No. 1 shall consist of the following counties and parts thereof: DeSoto, Tate, Panola, Tallahatchie (all except the precincts of Phillip, Leverette and Cascilla), Marshall, Lafayette, Yalobusha, Grenada, Calhoun, Benton, Tippah, Union, Pontotoc, Chickasaw, Alcorn, Tishomingo, Prentiss, Lee, Itawamba and Monroe.

District No. 2 shall consist of the following counties and parts thereof: Tunica, Coahoma, Quitman, Bolivar, Washington, Sunflower, Tallahatchie (precincts of Phillip, Leverette and Cascilla), Leflore, Carroll, Montgomery, Webster, Choctaw, Attala, Leake, Madison, Holmes, Humphreys, Yazoo, Sharkey, Issaquena and Warren.

District No. 3 shall consist of the following counties and parts thereof: Clay, Oktibbeha, Lowndes, Winston, Noxubee, Neshoba, Kemper, Rankin, Scott, Newton, Lauderdale, Simpson (all except the precincts of Harrisville, Pearl, Fork Church and Bridgeport), Smith, Jasper, Clarke and Jones.

District No. 4 shall consist of the following counties and parts thereof: Hinds, Claiborne, Copiah, Jefferson, Adams, Franklin, Lincoln, Lawrence, Jefferson Davis, Wilkinson, Amite, Pike, Walthall, Marion, Simpson (precincts of Harrisville, Pearl, Fork Church and Bridgeport).

District No. 5 shall consist of the following counties: Covington, Wayne, Lamar, Forrest, Perry, Greene, Pearl River, Stone, George, Hancock, Harrison and Jackson.

The boundaries of all counties and precincts mentioned above shall be such boundaries as they existed on July 1, 1981. A map depicting the foregoing court-ordered interim congressional redistricting plan is appended hereto as Exhibit "A".

4. There is hereby ordered into effect the special time schedule and other procedures respecting the 1982 congressional primary and general elections:

July 13, 1982 at 6 p.m.	Deadline for candidate qualification for primaries
August 17, 1982	First Primary
August 31, 1982	Second Primary
September 14, 1982 at 6 p.m.	Deadline for independent candidate qualification
November 2, 1982	General election.

5. All persons who have previously announced, paid qualifying fees and otherwise qualified as 1982 candidates for any congressional district may reannounce their candidacy on the basis of the districts hereinabove established and requalify with state and party officials, but are excused from paying additional qualifying fees; and in case a previously announced candidate may choose to run in a district having a different designation by number, such person may, upon direction to the appropriate officials, obtain transfer of the sum so paid. All Mississippi election statutes in conflict with the foregoing terms of this order are stayed only to the extent of such conflict for the initial purpose of conducting the 1982 congressional elections; otherwise provisions of state law remain unaffected.

The above named defendants with statutory and political party authority to conduct the 1982 congressional elections are hereby enjoined and commanded to schedule, prepare for, hold, conduct, and certify such elections strictly in accordance with ¶¶ 3, 4 and 5 hereof.

The court reserves the power to issue supplemental orders, should the need arise, to carry out the provisions of this order.

This, 8th day of June, 1982.

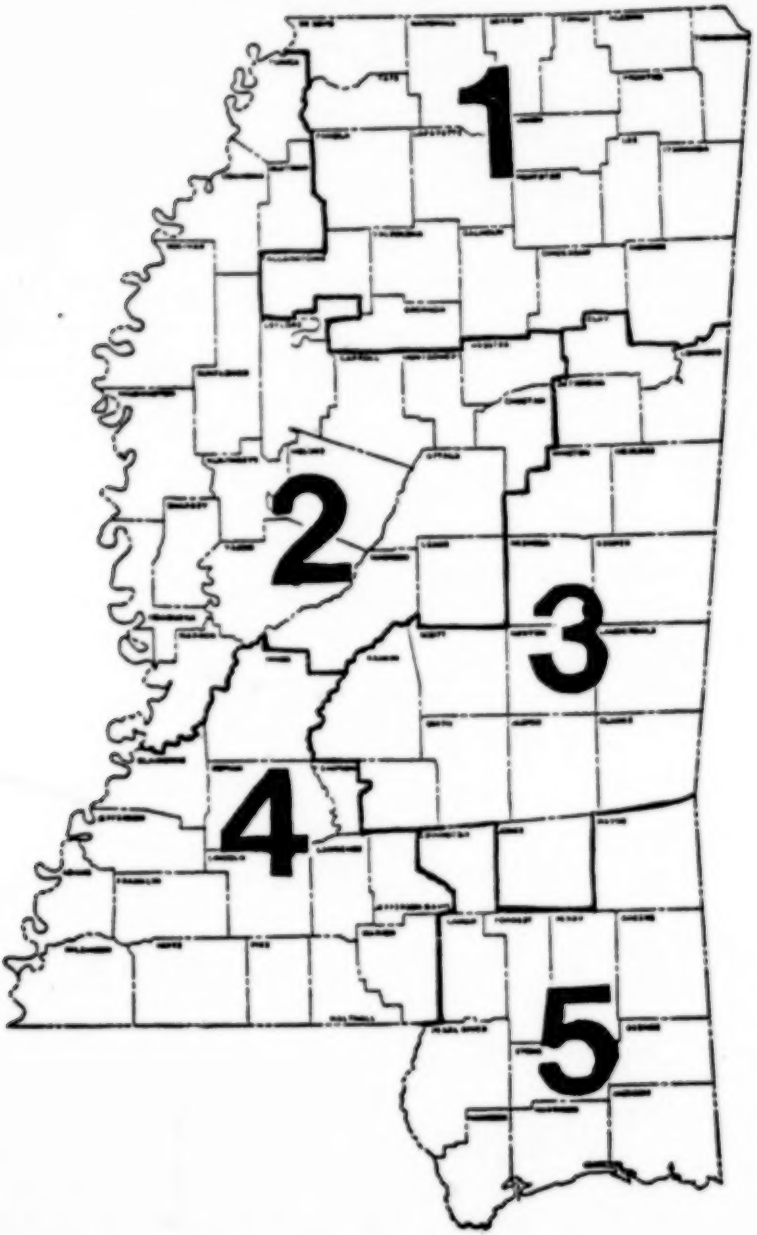
/s/ Charles Clark
United States Circuit Judge

/s/ William C. Keady
United States District Judge

/s/ L. T. Senter, Jr.
United States District Judge
[SEAL]

EXHIBIT "A"

COURT-ORDERED INTERIM CONGRESSIONAL REDISTRICTING PLAN



APPENDIX B

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Fourteenth Amendment:

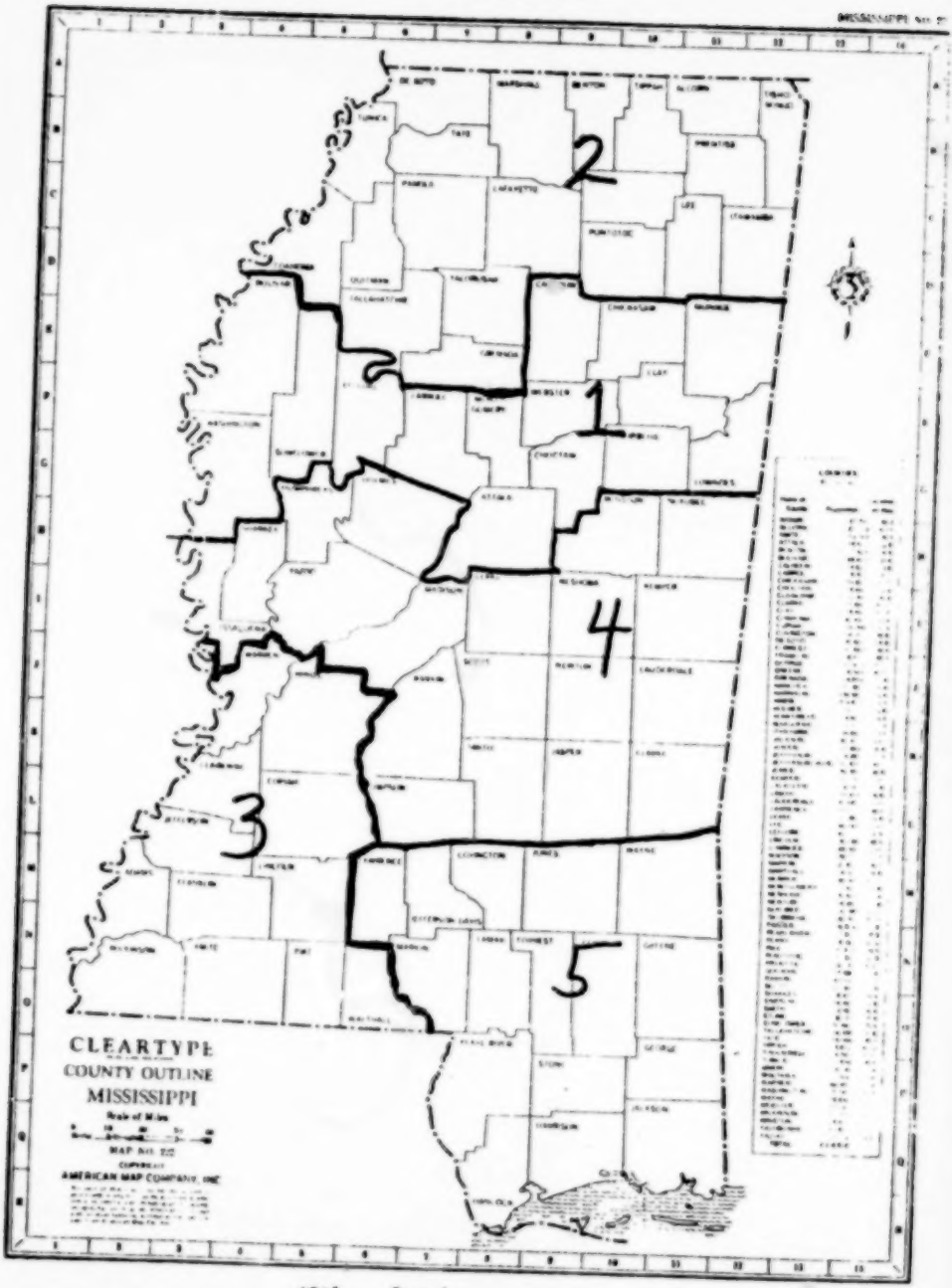
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. 1973c:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory

judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

APPENDIX C



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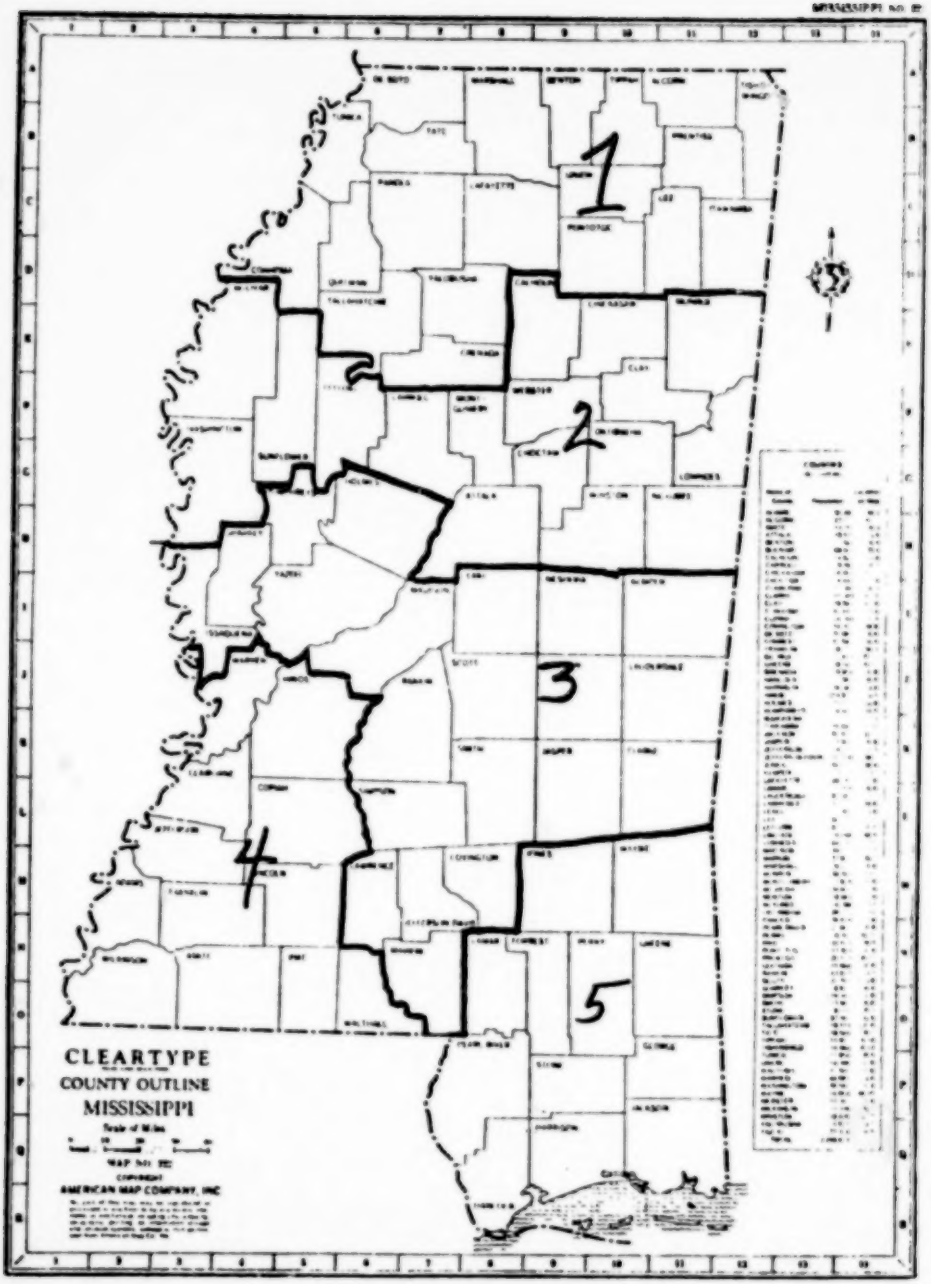
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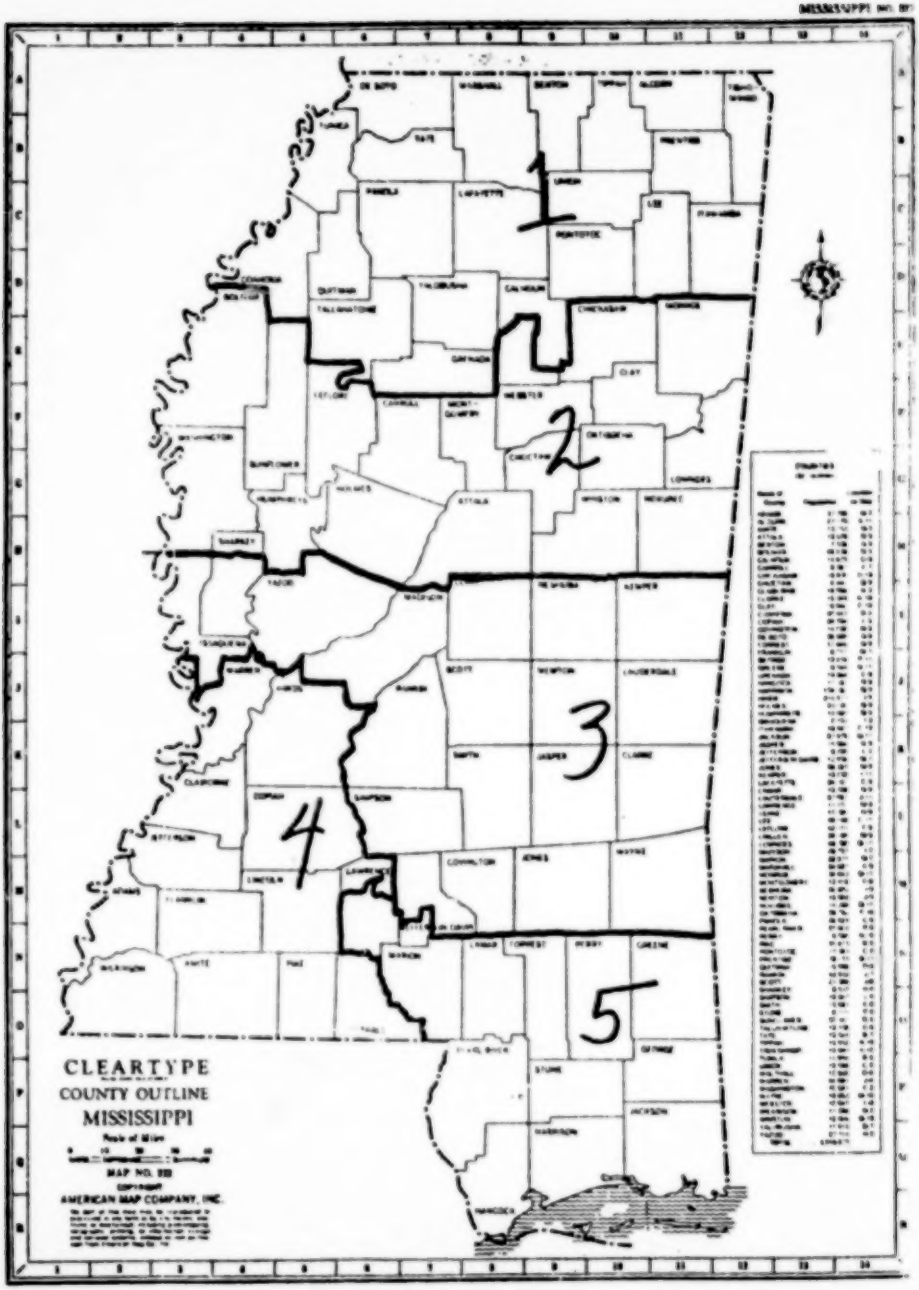
1972 PLAN



1981 PLAN
(S.B. 2001)

APPENDIX D

MAY 30 1972

Honorable A. F. Summer
Attorney General
State of Mississippi
The State Capitol Building
Jackson, Mississippi 39201

Dear Mr. Attorney General;

This is in response to your submission, on behalf of the State of Mississippi, of House Bill 448, the recently passed reapportionment of Mississippi's five Congressional seats. This submission was made pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

The Attorney General will not object to House Bill 448. The basis of this decision is our reading of *Connor* v. *Johnson*, 279 F. Supp. 620 (S.U. Miss. 1966). *affirmed*, 386 U.S. 483 (1967), in which it appears that the courts considered the Fifteenth Amendment implications of a similar Congressional redistricting plan in Mississippi and ruled in favor of the state. Because we feel bound by the decisions of the courts in that case, we do not interpose an objection.

We trust that you are aware that, as Section 5 provides, our present failure to object does not bar future litigation regarding House Bill 448's Fifteenth Amendment implications before the courts. Nor should this letter be construed as an approval; of the one person, one vote implications of House Bill 448, under *Kirkpatrick* v. *Preisler*, 394 U.S. 526 (1969), because the Attorney General does not have jurisdiction under Section 5 to determine such issues.

Sincerely,

DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

APPENDIX E

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

Washington, D.C. 20530

January 11, 1982

Jerris Leonard, Esquire
Jerris Leonard & Associates
Suite 1020
900 Seventh Street, N.W.
Washington, D.C. 20006

Dear Mr. Leonard:

This is in reference to Senate Bill No. 2001 (1981), providing for the reapportionment of the Mississippi Congressional districts, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended. Your submission was received on November 10, 1981.

We have given careful consideration to all of the forwarded materials as well as to other information available to focus once again on the State's reapportionment of 1966 which adopted a district configuration that fragmented the Mississippi Delta area into three districts. As you know, that 1966 plan was never submitted for Section 5 preclearance. However, a federal district court, in a constitutional challenge to the plan, sustained it on the ground that plaintiffs had failed to carry their burden of proving purposeful discrimination pursuant to the Fifteenth Amendment. *Connor* v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966), aff'd, 386 U.S. 483 (1967).

When the State reapportioned in 1972, following the 1970 Census, the State submitted the 1972 plan to the Attorney General pursuant to Section 5. That plan essentially followed the districting configuration for the Delta areas that had been adopted in 1966. The Attorney General determined, based on

the then prevailing decisional law (*Connor* v. *Johnson*, 402 U.S. 690, 691 (1971) that he was bound by the district court's earlier *Connor* decision to preclear the 1972 plan without undertaking an independent evaluation of it to determine whether it satisfied Section 5 requirements.

Subsequent decisions of the United States supreme Court have made it clear that any reapportionment plan enacted by a covered state must be subject to an independent review under Section 5 without regard to whatever judicial scrutiny that plan may undergo. See *Connor* v. *Waller*, 421 U.S. 656 (1975); *Connor* v. *Finch*, 431 U.S. 407 (1977); *McDaniel* v. *Sanchez*, Sup. Ct. No. 80-180, decided June 1, 1981. Consequently, were we to consider the 1972 plan today we would be compelled to review that plan on its merits under the purpose/effect standard of Section 5 rather than forego that analysis in deference to the district court's 1966 decision.

This raises the troublesome question with regard to the present submission as to whether the proper comparison is with the State reapportionment in 1972, which has never been tested under Section 5, with the State reapportionment in 1966, which also has never been tested under Section 5, or with the pre-1966 State reapportionment, which was in effect at the time the Voting Rights Act was adopted. In order to resolve this question in a meaningful way and on a fully informed basis, it is necessary that we receive from you additional information regarding your submission. Specifically, we request, as I discussed with you today by telephone, that you provide us with an analysis of the district or districts in the Delta area as configured in 1965, in 1966 after reapportionment, and in 1972 after reapportionment, including population statistics as determined by the 1960 census, the 1970 Census and the 1980 Census.

As soon as this information is provided to us we will undertake to complete our assessment of the current submission on

an expedited basis and will meet with you promptly to discuss the analysis provided.

Sincerely,

WM. BRADFORD REYNOLDS
Assistant Attorney General
Civil Rights Division

APPENDIX F

Memorandum Opinion, *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C. June 28, 1982)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0956

STATE OF MISSISSIPPI,
Plaintiff,

v.

WILLIAM FRENCH SMITH,
Defendant,

HENRY J. KIRKSEY, ET AL.,
Intervening Defendants.

MEMORANDUM

Before WRIGHT, *Circuit Judge*; GESELL, *District Judge*.[1]

The State of Mississippi has filed this action pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1976), seeking a declaratory judgment that the 1981 reapportionment of the State's congressional districts (S.B. 2001) "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." *Id.* This matter is now before the Court after full argument on plaintiff's motion for partial summary judgment and plaintiff's motion *in*

---

[1] Judge Richey, the third member of the panel, did not participate.

limine and the respective oppositions thereto filed by the United States and intervening defendants.

Mississippi seeks a determination prior to trial that the nonretrogression principle announced in *Beer* v. *United States*, 425 U.S. 130 (1976), requires that the effect of the 1981 reapportionment plan must be measured by comparison with the Mississippi reapportionment plan adopted in 1972. Further, by its motion *in limine* Mississippi seeks an order "limiting the evidence on the issue of discriminatory purpose to the legislative process in 1981 which culminated in the development and enactment" of the 1981 plan. In opposition it is urged that the Court must consider in this proceeding pre-1981 evidence of the alleged continuing purpose of Mississippi to discriminate and that the retrogressive effect of the 1981 plan should be measured by comparison with apportionment plans in effect in 1964 or prior thereto.

The crux of this dispute is the claim that Mississippi has divided black voters residing in the so-called Delta Region among several different congressional districts for the purpose of preventing the election of a black to the United States Congress. The Delta Region is a distinct geographical and cultural region in the northwestern part of the State. Although black persons residing in the State comprise only 35.2 percent of the total population, the Delta historically had a high proportion of blacks and according to the most recent Census was majority black in 1980. Given the apparent prevalence of block voting in Mississippi, the United States claims that Mississippi's current apportionment scheme continues to deprive blacks of the opportunity to elect one of their own race to the House.

A brief review of the developments in Mississippi will aid understanding of our decision. The stipulated record demonstrates that since the late nineteenth century through the date of enactment of the Voting Rights Act,

the Delta Region has been contained in one congressional district despite numerous other districting changes required by changes in population or political considerations over this period. Although blacks were a potential electoral majority in the Delta district under each of these various plans, they exerted virtually no political control because of the State's "long-standing, carefully prepared, and faithfully observed plan to bar Negroes from voting. . . ." *United States* v. *Mississippi*, 380 U.S. 128, 135-36 (1965). In 1964, only 6.7 percent of blacks in Mississippi eligible to vote were registered. As various restrictions on black registration and voting were removed, blacks in the Delta Region gained more and more voting strength.

In 1965 a suit was instituted in federal court, challenging the then-exsiting 1962 plan as violative of the one-person, one-vote formula. *Connor* v. *Johnson*, Civ. 3380 (S. D. Miss. October 19, 1965). In response to this litigation the State legislature undertook a comprehensive reapportionment of the State congressional districts. Under the plan adopted by the legislature on April 7, 1966, the Delta Region, which had a longitudinal configuration, was divided horizontally among three districts, eliminating the 59 percent black majority that then existed in the Delta Region. As a result of this reapportionment no district in the State had a majority black voting age population. This plan was submitted to the *Connor* v. *Johnson* Court, which held that the plan was not racially discriminatory and also satisfied the one-man, one-vote constitutional standard. *Connor* v. *Johnson*, 279 F. Supp. 619 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967). Although this apportionment plan required preclearance pursuant to section 5 of the Voting Rights Act, *see McDaniel* v. *Sanchez*, 452 U.S. 130 (1981), it was not submitted to the Attorney General for preclearance nor was it the subject of a declaratory judgment action in the United States District Court for the District of Co-

lumbia. As a result, the 1966 plan was never scrutinized under Voting Rights Act standards.[2]

Following the 1970 Census the State of Mississippi was required to adopt a new apportionment plan to reflect population changes. In broad outline, however, the State simply reenacted the 1966 plan; each of the State's five congressional districts was majority white in population. The State submitted this 1972 plan to the Attorney General for preclearance pursuant to section 5 of the Voting Rights Act. The Attorney General did not make a factual determination as to whether the State had demonstrated that the plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973c. Rather, it was simply indicated:

> The Attorney General will not object to [the 1972 plan]. The basis of this decision is our reading of *Connor* v. *Johnson*, 279 F. Supp. 620 (S.D. Miss. 1966), *aff'd*, 386 U.S. 483 (1967), in which it appears that the courts considered the Fifteenth Amendment implications of a similar Congressional redistricting plan in Mississippi and ruled in favor of the state. Because we feel bound by the decisions of the courts in that case, we do not interpose an objection.

---

[2] Plaintiff's suggestion that the ruling that apportionment plans are subject to section 5 review, *see* Georgia v. United States, 411 U.S. 526 (1973), should only be applied prospectively in light of Allen v. State Board of Elections, 393 U.S. 544 (1969), is entirely without merit. Although the *Allen* Court declined to overturn elections based on various enactments affecting voting which were not clearly within the scope of section 5 prior to the Court's decision, the Court did not suggest that the enactments could be used in the future either for the purpose of conducting elections or as benchmarks against which to measure future electoral changes under section 5. Indeed, the Court specifically directed the District Courts on remand "to issue injunctions restraining the further enforcement of the enactments until such time as the States adequately demonstrate compliance with § 5." *Id.* at 572.

This position was consistent with the then-policy of the Department of Justice not to make a section 5 determination in those instances where the voting change had previously been addressed by a federal district court and found to meet constitutional standards. *See Morris* v. *Gressette*, 432 U.S. 491, 497, n.8 (1977); *Georgia* v. *United States*, 411 U.S. 526, 535 n.6 (1973).

Subsequent Supreme Court decisions reveal the error of this policy. It is now clear that section 5 preclearance procedures must be followed even where there has been a federal court determination that the plan meets constitutional standards. *See McDaniel* v. *Sanchez*, 452 U.S. 130, 150-51 (1981); *Connor* v. *Waller*, 421 U.S. 656 (1975) (*per curiam*); *Harper* v. *Levi*, 520 F.2d 53, 69 (D.C. Cir. 1975). (Attorney General's deference to constitutional adjudication is "fundamentally inconsistent with clearly expressed congressional intent underlying Section 5"). Indeed, it is now apparent that the *Connor* v. *Johnson* Court lacked jurisdiction to consider the constitutionality of the plan before it had been precleared pursuant to section 5. *See McDaniel* v. *Sanchez*, 452 U.S. at 153.

In 1981 Mississippi was again required to adopt a new congressional apportionment plan to reflect further population changes disclosed by the 1980 Census. Although the legislature discussed the possibility of recreating a black majority vote in the Delta district this, as well as other alternatives, was rejected. The adopted plan provides for five congressional districts with a configuration virtually identical to the 1966 and 1972 lines; each of these districts is majority white. The plan was submitted to the Attorney General for section 5 review and on March 30, 1982, a timely section 5 objection was interposed. The plan is now before this Court for section 5 review.

In April, 1982, certain black residents of the State of Mississippi, some of whom are also defendant-intervenors

in this action, filed suit in the United States District Court for the Northern District of Mississippi seekng to enjoin implementation of the 1981 plan because it had not been approved by the Attorney General or this Court. The plaintiffs also sought to enjoin implementation of the congressional districting plan adopted in 1972 on the ground that the existing districts were unconstitutionally malapportioned. After the parties had fully briefed the issues in this case but prior to oral argument the Mississippi Court issued an opinion holding the 1972 plan unconstitutional as violative of the one-man, one-vote principle and enjoined its use. The Court also enjoined implementation of the 1981 plan pending a determination by this Court that the plan does not violate the Voting Rights Act or until another redistricting plan enacted by the State of Mississippi is precleared in accordance with section 5.

Given the need promptly to establish an electoral scheme to govern imminent congressional primary and general elections and its understanding that this Court could not rule on the 1981 plan for several months, the Mississippi Court ordered into effect an interim plan for the 1982 elections. Based on evaluation of black voting strength under different voting schemes, one-man, one-vote considerations, as well as various state political factors, the Court adopted the so-called Simpson amendment, which was considered but ultimately rejected by the legislature in 1981 in favor of S.B. 2001. The Simpson amendment provides for a black majority district of 53.8 percent centered in the Delta Region. The Simpson plan remains in effect until a redistricting plan enacted by the State of Mississippi is preclared under section 5 of the Voting Rights Act.

As initially presented to the Court upon the briefs, this motion for partial summary judgment raised the issue whether the Court was required to compare the 1981 plan to the 1972 plan or, in the alternative, to the prior

plan adopted in 1966, in determining whether the 1981 plan has an impermissible retrogressive effect, or whether instead the proper benchmark for such determination was some other apportionment plan adopted prior to 1966. It is very doubtful that an apportionment plan never reviewed on the merits under section 5 and which in fact is retrogressive compared to the districting scheme in effect on the effective date of the Voting Rights Act can ever serve as a firm benchmark for the purpose of measuring the possible discriminatory effect of subsequent plans. Although certain decisions appear to suggest that the existing plan is at least presumptively the appropriate benchmark, those opinions are distinguishable on their facts from the problem presented here. *See Beer* v. *United States*, 425 U.S. 130 (1976); *United Jewish Organizations* v. *Carey*, 430 U.S. 144 (1977). Furthermore, it would appear inconsistent with the intent of Congress in requiring section 5 review of every electoral change "different from that in force or effect on November 1, 1964," 42 U.S.C. § 1973c, to hold that an apportionment plan that is retrogressive as compared to the plan in effect on the effective date of the Act establishes a new benchmark for section 5 review. Whether in fact the 1981, the 1972 or the 1966 plans are retrogressive relative to the apportionment plan in effect on November 1, 1964, can, of course, be resolved only after a full hearing. In any event, the Court finds it unnecessary definitively to resolve these issues, at least at this time, in view of the recent order of the Three-Judge District Court for the Northern District of Mississippi.

The Court holds that whether or not the 1972 reapportionment plan (or prior 1966 plan) can serve as a benchmark, S.B. 2001 must, at a minimum, be shown not to be retrogressive relative to the plan ordered into effect by the Three-Judge Mississippi Court. In *United States* v. *Mississippi*, 490 F. Supp. 569 (D.D.C. 1979), *aff'd*, 444 U.S. 1050 (1980), the Court held based on almost identical facts that a judicial plan ordered into

effect subsequent to the filing of a section 5 declaratory judgment action should be considered the preexisting plan and at least the initial benchmark against which to assess the effect of the statutory plan, *id.* at 582.[3] We believe that this decision stands for at least this much: a section 5 declaratory judgment should be denied when the electoral plan under review is retrogressive in comparison to a court-ordered plan that will be implemented absent approval of the statutory plan. It would be entirely inconsistent with the teaching of *Beer* to suggest that the Court must accept a statutory plan that increases black voting strength to a lesser degree than a court-ordered plan in effect merely because the court-ordered plan will exist only until another plan is precleared under section 5.

On the present record, it appears that this initial inquiry may be decisive of the issue whether the 1981 plan violates the nonretrogression standard of the Voting Rights Act. Accordingly, we will defer any definitive resolution of the question whether either the 1972 or 1966 plan may serve as a benchmark pending a full factual inquiry into the possible retrogressive effect of the 1981 plan relative to the court-ordered plan. If plaintiff is of the view that it can establish that the 1981 plan is not retrogressive in comparison with the court-ordered plan then this matter must proceed to trial at the earliest possible date. Mississippi's continuing

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[3] We note that the Supreme Court's summary affirmance has only limited precedential value, especially given that the District Court noted in the alternative that the plan under review satisfied the nonretrogression principle when compared to the earlier 1975 plan. 490 F. Supp. at 582 n.6. *See* Fusari v. Steinberg, 419 U.S. 379, 391-92 (Burger, C.J., concurring) (summary affirmance of three-judge court "affirm[s] the judgment but not necessarily the reasoning"). On the other hand, the affirmance is perhaps due added weight because the three Justices who dissented on the merits explicitly stated that the court-ordered plan was the proper benchmark. *See* 444 U.S. at 1052 (Marshall, J. dissenting).

right to seek approval of any plan under section 5 at any time must be fully recognized.

The only remaining issue is whether evidence pertaining to possible discriminatory intent should be limited to the 1981 legislative process or whether evidence of the alleged discriminatory purpose underlying prior apportionment plans and carried forward by S.B. 2001 may be considered. The motion *in limine* will be denied. The value of historical background information for the purpose of assessing present discriminatory intent is well recognized. *See Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266-67 (1977); *City of Mobile* v. *Bolden*, 446 U.S. 55, 74 (1980). The appropriate weight, if any, to give this evidence can be determined by the Court based on a more complete legal and factual record.

Both the motion for partial summary judgment and the motion *in limine* shall be denied. An appropriate Order is filed herewith.

/s/ J. Skelly Wright
United States Circuit Judge

/s/ Gerhard A. Gesell
United States District Judge

June 28, 1982.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 82-0956

STATE OF MISSISSIPPI,
Plaintiff,

v.

WILLIAM FRENCH SMITH,
Defendant,

HENRY J. KIRKSEY, ET AL.,
Intervening Defendants.

ORDER

Before WRIGHT, *Circuit Judge*; GESELL, *District Judge.*

For the reasons stated in the Court's Memorandum filed herewith, it is hereby

ORDERED that plaintiff's motion for partial summary judgment is denied; and it is further

ORDERED that plaintiff's motion *in limine* is denied; and it is further

ORDERED that a status conference is set in Courtroom No. 6 at 9:00 a.m. on July 14, 1982, to set a definite schedule for any further proceedings that may be deemed appropriate.

/s/ J. Skelly Wright
United States Circuit Judge

/s/ Gerhard A. Gesell
United States District Judge

June 28, 1982.

Office - Supreme Court, U.S.
FILED
OCT 15 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-413

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

WILLIAM F. WINTER, GOVERNOR, *et al.*,
Appellants,

v.

OWEN H. BROOKS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

---

MOTION TO DISMISS OR AFFIRM

WILLIAM L. ROBINSON
FRANK R. PARKER *
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway St.
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

ROBERT BRUCE MCDUFF
RATNER & SUGARMON
Suite 525
Commerce Title Building
Memphis, Tennessee 38103
(901) 525-8601

Attorneys for Appellees

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-413

WILLIAM F. WINTER, GOVERNOR, *et al.*,
Appellants,

v.

OWEN H. BROOKS, *et al.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Mississippi

---

MOTION TO DISMISS OR AFFIRM

Appellees in the above-captioned appeal, who are the appellants in *Owen H. Brooks, et al.* v. *William F. Winter, Governor, et al.*, No. 82-233, move the Court pursuant to Sup. Ct. Rule 16 to dismiss or affirm this cross-appeal on the ground that the questions presented are so unsubstantial as not to need further argument.[1]

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[1] Appellees in this case are Owen H. Brooks, Sarah B. Johnson, Rev. Harold R. Mayberry, Willie Long, Robert E. Young, Thomas Morris, Charles McLaurin, Samuel McCray, Robert Jackson, Rev. Carl Brown, June E. Johnson, and Lee Ethel Henry, individually and on behalf of all others similarly situated.

Appellants are William F. Winter, Governor of Mississippi, William A. "Bill" Allain, Attorney General of Mississippi, Edwin Lloyd Pittman, Secretary of State of Mississippi, in their official capacities as members of the Mississippi State Board of Commissioners, and the State Board of Election Commissioners, Mississippi Democratic Executive Committee, and Mississippi Republican Executive Committee.

STATEMENT OF THE CASE

The relevant facts of this case upon which appellees rely are set forth in our Jurisdictional Statement in No. 82-233.

THIS CROSS-APPEAL PRESENTS NO SUBSTANTIAL QUESTION

In No. 82-233, Owen H. Brooks, et al., appellees here, appealed from the final judgment of a three-judge District Court ordering into effect for congressional elections in Mississippi a court-ordered congressional redistricting plan. They contend that the District Court erred as a matter of law in ordering into effect a court plan which embodies the racial redistricting policies of the State of Mississippi which were incorporated in a legislatively-enacted congressional redistricting plan (the "least change" plan) to which the United States Attorney General interposed an objection pursuant to Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. They also contend that the District Court violated the court-ordered redistricting guidelines established by this Court, and most recently expressed in *Connor* v. *Finch*, 431 U.S. 407 (1977), that court-ordered plans should not be drawn in a manner which unnecessarily minimizes and dilutes black voting strength. That appeal presents substantial questions which should be resolved by this Court.

This cross-appeal by the defendants in that case, on the other hand, presents no substantial question which merits plenary consideration by this Court. The only question presented in this cross-appeal is whether Section 5 means what it says, *viz.*, that Mississippi, as a covered state, is precluded from implementing a new, legislatively-enacted congressional redistricting plan unless and until Section 5 preclearance has been obtained. Defendants concede that the Attorney General has rendered a valid Section 5 ob-

jection to the plan in question. Therefore, the District Court was correct in enjoining implementation of that plan "until it has been so precleared" (Jurisdictional Statement on Cross-Appeal, Appendix A, p. 20a).

I. THE ATTORNEY GENERAL'S ADMITTEDLY VALID SECTION 5 OBJECTION TO THE STATE'S "LEAST CHANGE" PLAN BARS IMPLEMENTATION OF THAT PLAN UNLESS AND UNTIL SECTION 5 PRECLEARANCE HAS BEEN OBTAINED.

Despite the fact that the Attorney General has determined that Mississippi's legislatively-enacted congressional redistricting plan is racially discriminatory and violative of the protections of the Voting Rights Act (J.S., No. 82-233, Appendix L), the state official defendants contend that (1) Mississippi has a "right" under the Voting Rights Act to implement the objected-to plan—despite the Attorney General's objection—pending adjudication of its preclearance lawsuit in D.C. District Court (J.S. on Cross-Appeal, p. 9); (2) that the District Court below erred as a matter of law in promulgating a court-ordered plan (*id.*, pp. 9-10); and (3) that the Attorney General's Section 5 objection does not constitute a finding of a Voting Rights Act violation which the District Court was obligated to remedy (*id.*, pp. 13-14).

None of these issues presents a substantial question, and all of them have been resolved by recent decisions of this Court.

Contrary to defendants' arguments, Mississippi clearly has no "right" to interim implementation of the Mississippi Legislature's plan unless and until Section 5 preclearance has been obtained. The circumstances presented in this cross-appeal are precisely those contemplated by this Court in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978), in discussing the circumstances under which a District Court faces the "unwelcome obligation" (437 U.S. at 540) of devising a court-ordered reapportionment plan. One of

those circumstances is when the state's plan has not been precleared under Section 5 of the Voting Rights Act, and the imminence of a state election requires the District Court to devise a court-ordered plan:

> Plans imposed by court order are not subject to the requirements of § 5, [footnote omitted] but under that provision, a State or political subdivision subject to the Act may not "enact or seek to administer" any "different" voting qualification or procedure with respect to voting without either obtaining a declaratory judgment from the United States District Court for the District of Columbia that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color" or submitting the change to the Attorney General and affording him an appropriate opportunity to object thereto. A new reapportionment plan enacted by a State, including one purportedly adopted in response to invalidation of the prior plan by a federal court, will not be considered "effective as law," *Connor* v. *Finch*, [431 U.S. 407] at 412; *Connor* v. *Waller*, 421 U.S. 656 (1975), until it has been submitted and has received clearance under § 5. Neither, in those circumstances, until clearance has been obtained, should a court address the constitutionality of the new measure. *Connor* v. *Finch*, *supra*; *Connor* v. *Waller*, *supra*. Pending such submission and clearance, if a State's electoral processes are not to be completely frustrated, federal courts will at times necessarily be drawn further into the reapportionment process and required to devise and implement their own plans.

437 U.S. at 542. These fundamental principles were reaffirmed by this Court last term in *Hathorn* v. *Lavorn*, —— U.S. ——, 72 L.Ed.2d 824, 837 (1982) (failure to obtain Section 5 preclearance "renders the change unenforceable"); and *Upham* v. *Seamon*, —— U.S. ——, 71 L.Ed.2d 725, 731 (1982) (court-ordered plan required "to cure any constitutional or statutory defect" in state's

plan); and previously in *McDaniel* v. *Sanchez*, 452 U.S. 130, 150, 153 (1981) (preclarance requirement of the Voting Rights Act is applicable to any plan submitted by a Section 5-covered jurisdiction).

In the proceedings below, the very same state officials who have filed this cross-appeal fully recognized that the "clear language" of Section 5 of the Voting Rights Act, given the Attorney General's Section 5 objection, bars any attempt to implement the Mississippi Legislature's "least change" plan (S.B. 2001):

> Affiants are not now attempting to utilize S.B. 2001 for the congressional primaries and elections in the State of Mississippi in 1982 without Section 5 preclearance. Affiants recognize and acknowledge the clear language of both Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, and Section 3 of S.B. 2001. Therefore, affiants will not now or in the future attempt to utilize S.B. 2001 in the State of Mississippi unless and until the use of S.B. 2001 is precleared by either the Attorney General of the United States or the United States District Court for the District of Columbia . . .

Defendants' Motion to Dismiss Count One of the *Brooks* Complaint, Joint Affidavit of William F. Winter, Bill Allain, and Edwin Lloyd Pittman, pp. 3-4.

The bar to implementing any unprecleared plan is fundamental to the statutory scheme provided by Congress in enacting Section 5:

> The Voting Rights Act "implemented Congress' firm intention to rid the country of racial discrimination in voting." *Allen* v. *State Board of Elections*, 393 U.S. 544, 548 (1969). Fearing that covered jurisdictions would exercise their ingenuity to devise new and subtle forms of discrimination, Congress prohibited those jurisdictions from implementing any change in voting procedure without obtaining preclearance under § 5.

Hathorn v. *Lavorn*, *supra*, 72 L.Ed.2d at 836. Section 5 grew out of a demonstrated need to "shift the advantage of time and inertia from the perpetrators of the evil to its victims," *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966). By extending the protections of Section 5 this year, Congress has determined that this need still exists.[2]

The statutory framework of Section 5 therefore creates a presumption for covered states and jurisdictions that any new voting scheme is racially discriminatory and cannot be implemented until express Section 5 approval—from the Attorney General or the D.C. District Court—has been obtained. Once a Section 5 objection has been lodged, "the normal presumption of legitimacy afforded the balances reflected in legislative plans, see *Burns*, *supra*, at 84-85, could not be indulged." *Wise* v. *Lipscomb*, *supra*, 437 U.S. at 549 (Powell, J., concurring).

The bar to implementation of unprecleared plans applies equally to Federal District Courts. The congressional mandate

> requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people—no matter what constraints have limited the choices available to them—the preclearance requirement of the Voting Rights Act is applicable.

McDaniel v. *Sanchez*, *supra*, 452 U.S. at 153. The Mississippi District Court therefore was barred from implementing the state's legislative plan absent Section 5 preclearance. See also, *Connor* v. *Waller*, 421 U.S. 656 (1975); *Perkins* v. *Matthews*, 400 U.S. 379, 386 (1971).

Contrary to the defendants' argument (J.S. on Cross-Appeal, pp. 9-10), the order of the District Court below

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[2] Voting Rights Act Amendments of 1982, 96 Stat. 131, signed into law by President Reagan on June 29, 1982.

does not deny Mississippi its statutory remedy of a judicial determination whether S.B. 2001 complies with the Voting Rights Act. The District Court's order is by its terms temporary—S.B. 2001 is enjoined only "until it has been so precleared." J.S. on Cross-Appeal, Appendix A, p. 20a. Regardless of the Mississippi District Court's order, Mississippi remains free to pursue its lawsuit in the District of Columbia District Court seeking to overturn the Attorney General's objection.[3]

In this case, these state officials cannot complain of any delay in obtaining a prompt Section 5 determination of the validity of the legislative plan. Mississippi had an opportunity to obtain a Section 5 determination from the Justice Department as early as January, 1982, but counsel for the state persuaded Justice Department officials to seek additional information (J.S. on Cross-Appeal, p. 5), thus extending the period within which the Attorney General could object.[4] Further, when the state was offered an

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[3] The question of the validity of the District of Columbia District Court's interlocutory ruling that whether S.B. 2001 now has a discriminatory effect—the *Beer* retrogression standard—should now be determined by comparing it with the court-ordered plan, discussed in the Jurisdictional Statement on Cross-Appeal, pp. 9-10, concerns the interlocutory ruling of the D.C. District Court, and is not properly presented in this cross-appeal.

[4] In Ex. C-1, ¶ 10, p. 4, the defendants stipulated that the January 11, 1982 letter requesting additional information was written "after telephone conversations" between the Assistant Attorney General in charge of the Civil Rights Division of the Justice Department and the Joint Legislative Committee Chief Counsel, who represented the defendants below and here. Although the stipulation does not so state, it was common knowledge at the time that Mr. Leonard persuaded the Assistant Attorney General not to object at that time, but to give the state more time to make its case with the Justice Department. Defendants admit in their Jurisdictional Statement that they used this additional 60 days to "attempt[] to elucidate [the state's] position that S.B. 2001 could not be said to retrogress since it enhanced black voting strength as compared to the previously precleared 1972 plan" (p. 5).

early, expedited trial on its Section 5 preclearance lawsuit in the District Court for the District of Columbia, the early trial date was declined by counsel for the state.[5] The defendants should not be heard to complain about any delay in obtaining a final adjudication of their plan when any delays in this case are of their own making.

In essence, the defendants' argument boils down to the novel and unprecedented claim that the mere filing by the state of its Section 5 preclearance action in the District Court for the District of Columbia automatically suspends the operation of the Attorney General's Section 5 objection, grants presumptive preclearance to the legislative plan, and makes that plan available to the Mississippi District Court for use as a court-ordered redistricting plan. No court has ever issued such a ruling, and the contention is contrary to the fundamental congressional purpose and to the entire statutory structure of Section 5. In order to sustain this claim, this Court would be required to overrule *McDaniel* v. *Sanchez*, *supra*; *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 642 (1977); *Connor* v. *Waller*, 421 U.S. 656 (1975); and *Perkins* v. *Matthews*, 400 U.S. 379 (1971), all of which hold that a local District Court is without jurisdiction to approve and order into effect a legislatively enacted redistricting plan or other voting law change which has not been precleared pursuant to Section 5.

Defendants' claim is similar to that recently advanced —unsuccessfully—by the State of Georgia in *Busbee* v. *Smith*, Civil No. 82-0665 (D.D.C. May 24, 1982). The Georgia Legislature enacted a new congressional redistricting plan, and the Attorney General objected to the plan pursuant to Section 5. Georgia filed a declaratory judgment lawsuit in the District Court for the District

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[5] Pre-Trial Conference, April 16, 1982, *Mississippi* v. *Smith*, Civil No. 82-0956 (D.D.C.), Transcript, p. 27.

of Columbia, but before any final ruling was issued, the Georgia Attorney General issued an opinion which authorized state election officials to implement the plan prior to preclearance. The District Court issued an order enjoining any implementation of the plan until the state had obtained a Section 5 declaratory judgment, Memorandum Opinion and Order of May 24, 1982, and two Justices of this Court, Chief Justice Burger and Justice Rehnquist, denied stays of the District Court's injunction. *Busbee* v. *Smith*, No. A-1018 (May 25 and June 1, 1982).

None of the cases upon which defendants rely lend any credence to their claim. In *Georgia* v. *United States*, 411 U.S. 526 (1973), this Court did not hold that Georgia had a right to use its unprecleared legislative reapportionment plan pending further Section 5 proceedings, but merely granted a stay of the District Court's decision to resolve the questions presented in the state's appeal. Contrary to defendants' assertions, once this Court held that Georgia's legislative reapportionment plan was covered by Section 5, and that the Attorney General had entered a timely objection to that plan, this Court affirmed the District Court's injunction against use of that plan, and remanded the case

> with instructions that any future elections under the Georgia House reapportionment plan be enjoined unless and until the State, pursuant to § 5 of the Voting Rights Act, tenders to the Attorney General a plan to which he does not object, or obtains a favorable declaratory judgment from the District Court for the District of Columbia.

411 U.S. at 541. In *Perkins* v. *Matthews*, 400 U.S. 379, 396-97 (1971), this Court did not hold that the authority of the District Court to enjoin voting law changes to which the Attorney General has objected is discretionary. The court merely held that when local officials attempt to

implement a change which has not been submitted for Section 5 review, "in certain circumstances" the District Court might order local officials to seek Section 5 preclearance and order "a new election only if local officials fail to do so or if the required federal approval is not forthcoming." The Court did not address the situation presented here where an objection already has been lodged.

In *Berry* v. *Doles*, 438 U.S. 190 (1978), this Court merely refused to overturn an election already held where there were questions whether the change was covered by Section 5. In the two other reported District Court decisions upon which defendants rely, the courts actually enjoined implementation of the unprecleared plans. *Horry County* v. *United States*, 449 F. Supp. 990 (D.D.C. 1978); *Heggins* v. *City of Dallas*, 469 F. Supp. 739 (N.D. Tex. 1979). *Burton* v. *Hobbie*, Civil No. 81-617-N (M.D. Ala. June 21, 1982), simply involved exceptional circumstances not present in this case.

Apart from the lack of any legal claim, Mississippi also has no equitable claim to use of this discriminatory plan pending judicial preclearance proceedings. As the Attorney General determined in his Section 5 objection letter (J.S., No. 82-233, Appendix B), Mississippi has gerrymandered its five congressional districts to dilute black voting strength since the Voting Rights Act was first enacted. This history of Mississippi's congressional redistricting efforts shows that plans enacted in 1966, 1972, and 1981 were all racially motivated to prevent black voters from electing candidates of their choice (*id.*, pp. 16-23). Although the state claims that public hearings were held on S.B. 2001, the unanimous testimony of every black witness for a majority black district was totally and completely ignored (*id.*, p. 23). The District Court's

injunction against the use of S.B. 2001, even on an interim basis, therefore was also just and equitable.

Defendants' claim that they have a right to implement their unprecleared congressional redistricting plan pending judicial preclearance proceedings would nullify the express statutory prohibitions of Section 5, is contrary to all the relevant decisions of this Court, is totally unsupported by any relevant decision, and fails to present a substantial question for plenary review by this Court.

II. THE DISTRICT COURT CORRECTLY DEFERRED TO THE ATTORNEY GENERAL'S SECTION 5 OBJECTION AND THE SECTION 5 PRECLEARANCE PROCEEDINGS IN THE DISTRICT OF COLUMBIA DISTRICT COURT.

The District Court carefully explained why it was precluded from ordering into effect S.B. 2001 on an interim basis. The court noted that when S.B. 2001 was submitted for Section 5 review, "it was specifically objected to by the Attorney General, who concluded that it violated § 5." "Insofar as this court's interim plan-making task is controlled by the Voting Rights Act, we may not substitute our judgment for that of the Attorney General. *Perkins* v. *Matthews*, 400 U.S. 379, 27 L.Ed.2d 476 (1971)." J.S. on Cross-Appeal, Appendix A, p. 10a. The court also noted that Mississippi had instituted its Section 5 preclearance lawsuit in the District Court for the District of Columbia. "It would be both inappropriate and unseemly for us to implement on a temporary basis the plan which those proceedings seek to preclear since we have other plans which will allow us to order temporary redistricting which adequately reconciles state political policy with federal statutory and constitutional standards." *Id.*

Contrary to the defendants' argument (J.S. on Cross-Appeal, pp. 13-14), the Attorney General's Section 5 objection is dispositive of the issue of Section 5 preclearance unless and until a Section 5 declaratory judgment has been obtained from the District Court for the District of Columbia. *Canady* v. *Lumberton City Board of Education*, 454 U.S. 957 (1981); *United States* v. *Board of Supervisors of Warren County, Mississippi*, 429 U.S. 652 (1977); *Seamon* v. *Upham*, 536 F. Supp. 931, 958 (E.D. Tex. 1982), *aff'd in relevant part, rev'd in part*, 71 L.Ed.2d 725 (1982). In all those cases, the Attorney General lodged a Section 5 objection, and that objection was considered determinative of a Section 5 violation absent judicial preclearance in the District of Columbia District Court. There is no authority for the state's bizarre proposition that the mere filing of a Section 5 declaratory judgment action in the District Court for the District of Columbia vitiates the Attorney General's objection. The recent action of the D.C. District Court shows clearly that it does not. *Busbee* v. *Smith*, Civil No. 82-0665 (D.D.C. May 24, 1982), *stays denied*, No. A-1018 (May 25 and June 1, 1982).

The defendants' argument that the Attorney General's Section 5 objection is not dispositive of Section 5 compliance and does not constitute a Voting Rights Act defect which the District Court was required to remedy is utterly without support and fails to present a substantial question.

CONCLUSION

For the reasons stated herein, this appeal should be either dismissed or that portion of the District Court's judgment (J.S. on Cross-Appeal, Appendix A, Order, par. 4, p. 20a) enjoining implementation of S.B. 2001 "until it has been so precleared" should be affirmed.

Respectfully submitted,

WILLIAM L. ROBINSON
FRANK R. PARKER *
PATRICIA M. HANRAHAN
LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW
733 15th St., N.W., Suite 520
Washington, D.C. 20005
(202) 628-6700

JOHNNIE E. WALLS, JR.
WALLS, BUCK & IRVING, LTD.
163 North Broadway St.
Post Office Box 634
Greenville, Mississippi 38701
(601) 335-6001

ROBERT BRUCE MCDUFF
RATNER & SUGARMON
Suite 525
Commerce Title Building
Memphis, Tennessee 38103
(901) 525-8601

Attorneys for Appellees

* Counsel of Record